(25,125)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 842.

THE BALTIMORE & OHIO RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES B. WILSON.

IN ERROR TO THE APPELLATE COURT, FIRST DISTRICT, STATE OF ILLINOIS.

INDEX.

	Original.	Print
Transcript of record from the circuit court of Cook county....	1	1
Præcipe for summons.....	2	1
Summons	4	2
Declaration	6	2
Plea	23	12
Similiter	25	12
Motion and order to plead.....	27	13
Additional counts	28	13
Plea	33	15
Order beginning trial.....	35	16
Verdict	39	16
Motion for new trial.....	39	17
Verdict	41	17
Motion for new trial overruled.....	43	17
Motion in arrest overruled.....	43	17
Judgment	43	17

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 6, 1916.

	Original.	Print
Appeal allowed	43	17
Bond on appeal	45	18
Bill of exceptions	48	19
Testimony of Thomas Delaney	52	20
James Wilson	60	25
James Whitney Hall	147	72
William O. Krohn	163	80
George Huber	170	83
George Bergdorf	183	89
P. L. Williams	190	93
H. D. Matthews	198	97
Guy S. Briggs	204	100
Louis Thexton	213	104
Hiram Cearfoss	219	107
James Wilson (recalled)	229	112
Plaintiff rests	237	116
Motion for verdict for defendant	237	117
Testimony of Otis C. Spieth	239	117
Defendant's Exhibit 1—Map of B. & O. system, Cleveland division	241	118
Testimony of John R. Van Winkle	243	120
Howard V. Miller	259	128
Stephen O. Lewis	276	137
Henry H. Smith	286	142
S. M. Stewart	288	144
Defendant's Exhibit 2—Conductor's train record	293	146
Defendant's Exhibit 3—Time report	294	146
Stipulation of facts	301	150
Defendant rests	304	152
Statement of H. V. Miller	304	152
Motion for verdict for defendant	305	152
Instructions given upon request of plaintiff	306	152
Instructions given upon request of defendant	312	155
Defendant's instructions refused	328	158
Verdict	331	159
Motion for new trial	331	159
Motion for new trial overruled	331	159
Motion in arrest of judgment overruled	332	159
Appeal allowed	332	159
Judge's certificate to bill of exceptions	333	159
Stipulation as to bill of exceptions	334	160
Clerk's certificate	335	160
Assignment of errors in appellate court	336	160
Assignment of cross-errors in appellate court	339	162
Minutes of appellate court	340	162
Order of argument	341	162
Orders extending time, etc	342	163
Stipulation and order correcting record	346	164
Judgment of appellate court	347	165
Petition for rehearing denied	349	166
Order granting stay of mandate	350	166
Opinion, McSurely, J	351	166

	Original.	Print
Clerk's certificate	356	169
Petition for writ of error	358	170
Final order of supreme court of Illinois	367	175
Petition for writ of certiorari	368	176
Assignment of errors	370	188
Certificate of McSurely, J.	376	191
Bond on writ of error	379	191
Order allowing writ of error	383	193
Writ of error	385	194
Certificate of lodgment	388	195
Citation and service	390	195
Affidavit and order extending time of return	394	197
Præcipe for transcript of record	397	197
Return to writ	399	198

1 UNITED STATES OF AMERICA:

STATE OF ILLINOIS,
County of Cook, ss:

Pleas Before the Honorable Oscar E. Heard, Judge of the Fifteenth Judicial District of the State of Illinois, holding a branch of the Circuit Court of Cook County, at the request of the Judges of said Circuit Court, at a term thereof begun and holden at the Court-house at Chicago, in said County and State, on the third Monday, being the 20th day of July, in the year of our Lord one thousand nine hundred and 14 and of the Independence of the United States the one hundred and thirty-ninth.

Present: Honorable Oscar E. Heard, Judge of the 15th Judicial District of the State of Illinois, holding a branch of the Circuit Court of Cook County, State of Illinois; Maclay Hoyne, State's Attorney; Michael Zimmer, Sheriff.

Attest:
JOHN W. RAINEY, *Clerk.*

Be it remembered that heretofore, to-wit: on the 9th day of April A. D. 1914 a certain præcipe was filed in the office of the Clerk of said Court, in words and figures following, to-wit:

2 STATE OF ILLINOIS,
County of Cook, ss:

Circuit Court of Cook County, March Term, A. D. 1914.

JAMES B. WILSON, Plaintiff,
vs.
BALTIMORE & OHIO RAILROAD COMPANY (a Corp.), Defendant.

Defendant Damages, $75,000.00.

The Clerk of said Court will issue a Summons in the above entitled cause to said Defendant in a plea of trespass on the case to the damage of said Plaintiff in the sum of seventy five thousand dollars, direct the same to the sheriff of Cook County to execute and make it returnable to the April Term of said Court A. D. 1914.

WEYMOUTH KIRKLAND,
C. E. STENNING,
MORSE IVES,
Plaintiff's Attorney-.

To John W. Rainey, Clerk.

Chicago, April 9th, 1914.

3 Thereupon on the same day to-wit: on the 9th day of April A. D. 1914 a certain People's writ of Summons issued out of the Office of the Clerk of said Court and under the seal thereof directed to the Sheriff of Cook County to execute which writ together with the return of the Sheriff thereon endorsed are in words and figures following to-wit:

4 STATE OF ILLINOIS,
County of Cook, ss:

The People of the State of Illinois to the Sheriff of said County, Greeting:

We command you that you Summon Baltimore and Ohio Railroad Company (a corp.) if it shall be found in your County, personally to be and appear before the Circuit Court of Cook County, on the first day of the term thereof, to be holden at the Court House in the City of Chicago, in said Cook County on the third Monday of April A. D. 1914 to answer unto James B. Wilson in a plea of Trespass on the case to the damage of said plaintiff, as it is said in the sum of Seventy five thousand dollars.

And have you then and there this writ, with an indorsement thereon, in what manner you shall have executed the same.

Witness, John W. Rainey, Clerk of our said Court, and seal thereof, at Chicago, in said County, this 9th day of April A. D. 1914.

[SEAL.] JOHN W. RAINEY, *Clerk.*

5 And afterwards to-wit, on the 10th day of April A. D. 1914 a certain declaration was filed in the office of the Clerk of said Court, in words and figures following, to-wit:

6 STATE OF ILLINOIS,
County of Cook ss:

In the Circuit Court Thereof.

B-2107.

JAMES B. WILSON
vs.
BALTIMORE & OHIO RAILROAD COMPANY, a Corporation.

James B. Wilson, plaintiff, by Morse Ives, Weymouth Kirkland and C. E. Stenning, his attorneys, complains of the Baltimore & Ohio Railroad Company, a corporation, defendant, of a plea of trespass on the case.

For that whereas on, to-wit, the 19th, 20th, 21st, 22nd and 23rd days of August, 1913, the defendant was a common carrier engaging in interstate commerce by railroad between certain states of the United States, including the States of Ohio and Pennsylvania; and the plaintiff was then and there employed by such carrier in such commerce, and in such employment he was engaged in and con-

nected with the movement of freight trains as conductor of such trains; that in the course of his said employment, at New Castle, Pennsylvania, at 2:15 o'clock P. M. on the 19th day of August, 1913, he was called by the defendant to work, and under the directions of the defendant he took a train at New Castle Junction, in Pennsylvania, at 4:15 o'clock P. M. on that day; that between said hours of 2:15 o'clock P. M. and 4:15 o'clock P. M., he was continuously engaged in preparation for his work and in proceeding to said New Castle Junction, and as required by the defendant he rode upon said train to Ohio Junction in the State of Ohio, and there took charge of a certain eastbound freight train, and conducted said latter train to said New Castle Junction, where he
7 arrived with said latter train at 2:45 o'clock A. M. on August 20th, 1913, and then without rest or intermission in his work he again went upon a train of the defendant to said Ohio Junction, as he was required and permitted by the defendant to do, and took charge of another eastbound train there and conducted said latter train to said New Castle Junction, and arrived at New Castle Junction with said latter train at 10:55 o'clock A. M. on August 20th, 1913; that during all of the time between 4:15 o'clock P. M. on August 19th, 1913 and 10:55 o'clock A. M. August 20th, 1913, the plaintiff was required and permitted to be continuously employed in and obout his work as aforesaid; that thereafter, at said New Castle, at 2:15 o'clock P. M. on August 20th, 1913, he was called by the defendant to work, and as required by the defendant he took a train at said New Castle Junction at 4:15 o'clock P. M. on August 20th, 1913; that between said last mentioned hours the plaintiff was continuously employed in preparation for his work and in proceeding to said New Castle Junction; that thereupon as required by the defendant he went upon said last mentioned train to Akron Junction in Ohio, and there took charge of an eastbound train and conducted said latter train to said New Castle Junction, and arrived at New Castle Junction at 9:10 o'clock A. M. August 21st, 1913; that between the hours of 4:15 o'clock P. M. on August 20th, and 9:10 o'clock A. M. on August 21st, 1913, he was continuously engaged in and about his work as aforesaid; that thereafter, at New Castle, Pennsylvania, at 3:00 o'clock P. M. on August 21, 1913, he was called by the defendant to take charge of a train and to leave said New Castle Junction at 5:00 o'clock P. M.; that between the hours last mentioned he was continuously engaged in preparing for his work and in proceeding to said New Castle Junction; that said latter train was delayed in leaving New Castle Junction until 6:30 o'clock P. M. on August 21, 1913, and between 5:00 o'clock P. M.
8 and 6:30 o'clock P. M. on the last mentioned date the plaintiff was engaged in waiting and in further preparations for departure from said New Castle Junction; that the plaintiff thereupon conducted said last mentioned train from New Castle Junction to Warwick, Ohio, and the plaintiff was continuously engaged in and about his work in the management of said train from 6:30 o'clock P. M. on August 21st, 1913, until 8:45 o'clock

A. M. on August 22nd, 1913, whereupon at said Warwick the plaintiff was relieved from the charge of said train; and was forthwith required by the defendant to proceed to Cleveland, Ohio; that he arrived at Cleveland at 5:10 o'clock P. M. on August 22nd, 1913; that he rode from Warwick to Cleveland upon a freight train; that he had no sleep or rest on this last mentioned journey and received his regular pay per hour from the defendant for the time engaged in said last mentioned trip; that upon his arrival in Cleveland at the time aforesaid he was required to register in the yard office of the defendant, and in going to and from said yard office he consumed, to-wit, one hour; thereupon he had his supper and thereafter attempted to sleep, and thereafter at 10:01 o'clock P. M. On August 22nd, 1913, at Cleveland he was called to work and required by the defendant to prepare to take charge of a train to leave Cleveland, Ohio, at 12:01 o'clock A. M. on August 23rd, 1913, and to conduct said train to New Castle Junction; that between the hours of 10:01 o'clock P. M. August 22nd, 1913, and 12:01 o'clock A. M. August 23rd, 1913, the plaintiff was continuously employed in preparation for his departure on said last mentioned train; that at, to-wit, 12:30 o'clock A. M. on the 23rd day of August, 1913, he left Cleveland in charge of said train; that between the hours of 12:01 o'clock A. M. and 12:30 o'clock A. M. on said date,
9 he was continuously engaged in waiting and in making further preparations for the departure of said train; that thereupon he conducted said train at Peninsula in the State of Ohio, and arrived at said Peninsula, at, to-wit: 1:45 o'clock A. M. on August 23rd, 1913; that at said Peninsula a certain car in said train had a "hot box", and said train was standing upon a main track of said railroad there, and the plaintiff preparatory to taking said car with the "hot box" from said train and placing it upon a sidetrack there, detached an engine from the front end of said train and caused said engine to back upon a sidetrack alongside of said standing train there, and the plaintiff rode upon the footboard at the rear of the tender of said engine and upon the end of said footboard nearest to said standing trains of cars there, and he continued to ride upon said footboard there until said engine in backing upon said sidetrack approached near to the car with said "hot box"; that said engine was then running slowly, and it was dark; and the plaintiff was then and there physically and mentally exhausted and nervous, his senses were dulled and his judgment was impaired on account of his excessive and continuous employments aforesaid and the lack of rest and sleep necessarily incident thereto, and while in this condition and for the purpose of uncoupling the car with said "hot box" from said train, he stepped off from said footboard there towards said train and between said sidetrack and said main track; and the defendant had theretofore negligently and carelessly constructed said sidetrack there and then and there negligently and carelessly permitted said sidetrack to be and remain unusually close to said main track upon which said train was then and there standing, so that it was dangerous for anyone to be between a train upon said main track and the engine passing upon

said sidetrack; and the plaintiff did not know that said side-track and said main track were unusually close, and the defendant did know it, and in the exercise of ordinary care should have
10 known that the plaintiff was ignorant of it, and negligently and carelessly failed to warn the plaintiff of the unusually close condition of said tracks there; and the defendant had theretofore negligently and carelessly filled in the space there between said main track and said sidetrack with certain soft slag, and then and there negligently and carelessly permitted said soft slag to be and remain uneven and rough so that anyone stepping thereon was likely to stumble and fall, so that when the plaintiff stepped from said footboard between said sidetrack and said main track there, as a direct result of the wrongful and unlawful conduct of the defendant in requiring and permitting the plaintiff to work as aforesaid, concurring with the several negligent acts and omissions of the defendant aforesaid, the plaintiff stumbled upon said soft and uneven slag and fell against one of the cars of said unusually close train and was struck by said engine and then and there by reason of the premises greatly injured, one *one* his arms was necessarily amputated; his back was broken; divers bones of his body were dislocated and broken; divers muscles, ligaments, membranes, nerves, blood vessels and tissues of his body were sprained, torn, cut, bruised and injured; divers organs of his body were displaced, bruised, torn and injured and their functions impaired; his brain and nervous system were greatly shocked and injured and their functions impaired, and by reason thereof he became sick, sore, lame and disordered, and has so remained from thence hitherto; and he has suffered great pain and anguish by reason of said injuries, and in the future will continue to suffer therefrom; and he has by reason of said injuries expended and necessarily incurred great liability and indebtness, to-wit, Three Thousand Dollars ($3000) in endeavoring to be cured of his said injuries and he has also been unable to work, and will in the future be unable to pursue his
11 usual occupation, and he has by reason thereof lost a large amount in wages and earnings, and in the future will continue by reason thereof to lose his earnings and wages.

2nd Count.

For that whereas, also, on to-wit, the 23rd day of August, 1913, the defendant was a common carrier by railroad engaged in interstate commerce between certain states of the United States, including Ohio and Pennsylvania; and the plaintiff was employed by said defendant in such commerce as a conductor of freight trains; that on, to-wit, the date aforesaid, he had charge of a train in the nighttime at Peninsula, Ohio, and said train was then and there standing upon a main track at said place, and there was a certain car in said train with a "hot box"; and there was a certain sidetrack running alongside of said main track there, and the plaintiff preparatory to detaching said car with said "hot box" from said train, detached an engine from the front end of said train and caused said engine to

back upon and along the said sidetrack, and the plaintiff rode upon a foot-board at the rear of the tender of said engine and upon the end of said foot-board nearest to said train upon said main track there until said engine in running upon said sidetrack there approached said car in said train with said "hot box", and said engine was then and there running slowly, and it was nighttime and dark; and the defendant had theretofore negligently and carelessly constructed a certain sidetrack there unusually close to said main track there, so that it was dangerous for anyone to be between said main track and the engine passing upon said sidetrack; and the plaintiff did not know that said tracks were so unusually close together there,

12 and the defendant did know that said tracks were unusually close together there and knew, or in the exercise of ordinary care should have known, that the plaintiff was ignorant of the unusual closeness of said tracks there; and the defendant negligently and carelessly failed to warn the plaintiff of the unusually close proximity of said tracks, and the plaintiff then and there, for the purpose of uncoupling said car with said "hot box" from said train, and without any knowledge of any danger to him there, stepped from said footboard towards said train and between said tracks there, and as a direct result of the concurrent negligent acts and omissions of the defendant aforesaid, as he stepped between said tracks there he was caught between said train and said engine and then and there by reason of the premises greatly injured; one of his arms was necessarily amputated; his back was broken; divers bones of his body were dislocated and broken; divers muscles, ligaments, membranes, nerves, blood vessels and tissues of his body were strained, torn, cut, bruised and injured; divers organs of his body were displaced, bruised, torn and injured and their functions impaired his brain and nervous system were greatly shocked and injured and their functions impaired; and by reason thereof he became sick, sore, lame and disordered, and has so remained from thence hitherto; and he has suffered great pain and anguish by reason of said injuries, and in the future will continue to suffer therefrom; and he has by reason of said injuries expended and necessarily incurred great liability and indebtedness, to-wit, Three Thousand Dollars ($3,000), in endeavoring to be cured of his said injuries; and he has also been unable to work, and will in the future be unable to pursue his usual occupation, and he has by reason thereof lost a large amount in wages and earnings, and in the future will continue by reason thereof to lose his earnings and wages.

13 3rd Count.

For that whereas, also, on to-wit, the 23rd day of August, 1913 the defendant was a common carrier by railroad engaged in interstate commerce between certain states of the United States, including Ohio and Pennsylvania; and the plaintiff was employed by said defendant in such commerce as a conductor of freight trains; that on, to-wit, the date aforesaid, he had charge of a train in the nighttime at Peninsula, Ohio, and said train was then and there standing upon

a main track at said place, and there was a certain car in said train with a "hot-box"; and there was a certain sidetrack running alongside of said main track there, and the plaintiff preparatory to detaching said car with said "hot box" from said train detached an engine from the front end of said train and cause- said engine to back upon and along the said sidetrack, and the plaintiff rode upon a footboard at the rear of the tender of said engine and upon the end of said footboard nearest to said train upon said main track there until said engine in running upon said sidetrack there approached said car in said train with said "hot box", and said engine was then and there running slowly, and it was nighttime and dark and the defendant then and there negligently and carelessly permitted the ground between said main track and said sidetrack there to be in a soft and uneven condition, so that anyone stepping from a car upon the ground there was likely to stumble and fall; and the plaintiff did not know of said soft and uneven condition between said tracks there, and in the exercise of ordinary care would not have known thereof; and the plaintiff then and there, for the purpose of uncoupling said car with a "hot box" from said train, stepped from said footboard toward said train and between said tracks there, and as a direct result of the negligence and carelessness of the
14 defendant as aforesaid he stumbled and fell upon said soft and uneven ground there and against one of the cars in said train, and thereupon was struck by said engine, so that by reason of the premises he was then and there greatly injured; one of his arms was necessary amputated; his back was broken; divers bones of his body were dislocated and broken; divers muscles, ligaments, membranes, nerves, blood vessels and tissues of his body were sprained, torn, cut, brusied and injured; divers organs of his body were displaced, bruised, torn and injured and their functions impaired; his brain and nervous system were greatly shocked and injured and their functions impaired; and by reason thereof he became sick, sore, lame and disordered, and has so remained from thence hitherto; and he has suffered great pain and anguish by reason of said injuries, and in the future will continue to suffer therefrom; and he has by reason of said injuries expended and necessarily incurred great liability and indebtedness, to-wit, Three Thousand Dollars ($3000), in endeavoring to be cured of his said injuries; and he has also been unable to work, and will in the future be unable to pursue his usual occupation, and he has by reason thereof lost a large amount in wages and earnings, and in the future will continue by reason thereof to lose his earnings and wages.

4th Count.

For that whereas, also, on to-wit, the 19th, 20th, 21st, 22nd and 23rd days of August, 1913, the defendant was a common carrier engaging in interstate commerce by railroad between certain states of the United States, including the States of Ohio and Pennsylvania; and the plaintiff was then and there employed by such carrier in such commerce, and in such employment he was engaged in and

connected with the movement of freight trains as conductor of such trains; that in the course of his said employment, at New
15 Castle, Pennsylvania, at 2:15 o'clock P. M. on the 19th day of August, 1913, he was called by the defendant to work, and under the directions of the defendant he took a train at New Castle Junction, in Pennsylvania, at 4:15 o'clock P. M. on that day; that between said hours of 2:15 o'clock P. M. and 4:15 o'clock P. M. he was continuously engaged in preparation for his work and in proceeding to said New Castle Junction, and as required by the defendant he rode upon said train to Ohio Junction in the State of Ohio, and there took charge of a certain eastbound freight train, and conducted said latter train to said New Castle Junction, where he arrived with said latter train at 2:45 o'clock A. M. on August 20th, 1913, and then without rest or intermission in his work, he again went upon a train of the defendant to said Ohio Junction and took charge of another eastbound train there and conducted said latter train to said New Castle Junction and arrived at New Castle Junction with said latter train at 10:55 o'clock A. M. on August 20th, 1913; that during all of the time between 4:15 o'clock P. M. on August 19th, 1913, and 10:55 o'clock A. M. August 20th, 1913, the plaintiff was required and permitted to be continuously employed in and about his work as aforesaid; that thereafter, at such New Castle at 2:15 o'clock P. M. on August 20th, 1913, he was called by the defendant to work, and as required by the defendant he took a train at said New Castle Junction at 4:15 o'clock P. M. on August 20th, 1913; that between said last mentioned hours the plaintiff was continuously employed in preparation for his work and in proceeding to said New Castle Junction; that thereupon as required by the defendant he went upon said last mentioned train to Akron Junction in Ohio, and there took charge of an eastbound train and conducted said latter train to said New Castle Junction, and arrived at New Castle Junction at 9:10 o'clock A. M. August 21st, 1913; that between the hours of 4:15 o'clock P. M. on August 20th, 1913, and 9:10 o'clock A. M. on August 21st, 1913, he was continuously en-
16 gaged in and about his work as aforesaid, that thereafter, at New Castle, Pennsylvania, at 3:00 o'clock P. M. on August 21, 1913, he was called by the defendant to take charge of a train and to leave said New Castle Junction at 5:00 o'clock P. M.; that between the hours last mentioned he was continuously engaged in preparing for his work and in proceeding to said New Castle Junction; that said latter train was delayed in leaving New Castle Junction until 6:30 o'clock P. M. on August 21, 1913, and between 5:00 o'clock P. M. and 6:30 o'clock P. M. on the last mentioned date the plaintiff was engaged in waiting and in further preparations for departure from said New Castle Junction; that the plaintiff thereupon conducted said last mentioned train from New Castle Junction to Warwick, Ohio, and the plaintiff was continuously engaged in and about his work in the management of said train from 6:30 o'clock P. M. on August 21st, 1913, until 8:45 o'clock A. M. on August 22nd, 1913, whereupon at said Warwick the plaintiff was relieved from the charge of said train, and was forthwith

required by the defendant to proceed to Cleveland, Ohio; that he arrived at Cleveland at 5:10 o'clock P. M. on August 22nd, 1913; that he rode from Warwick to Cleveland upon a freight train; that he had no sleep or rest on this last mentioned journey and received his regular pay per hour from the defendant for the time engaged in said last mentioned trip; that upon his arrival in Cleveland at the time aforesaid he was required to register in the yard office of the defendant, and in going to and from said yard office he consumed, to-wit, one hour; thereupon he had his supper and thereafter attempted to sleep, and thereafter at 10:01 o'clock P. M. on August 22nd, 1913, at Cleveland he was called to work and required by the defendant to prepare to take charge of a train to leave Cleveland, Ohio at 12:01 o'clock A. M. on August 23rd, 1913, and to
17 conduct said — to New Castle Junction; that bewteen the hours of 10:01 o'clock P. M. August 22nd, 1913 and 12:01 o'clock A. M. August 23rd, 1913, the plaintiff was continuously employed in preparation for his departure on said last mentioned train; that at to-wit, 12:30 o'clock A. M. on the 23rd day of August, 1913, he left Cleveland in charge of said train; that between the hours of 12:01 o'clock A. M. and 12:30 o'clock A. M. on said date, he was continuously engaged in waiting and in making further preparations for the departure of said train; that thereupon he conducted said train to Peninsula in the State of Ohio, and arrived at said Peninsula at, to-wit, 1:45 o'clock A. M. on August 23rd, 1913; that at said Peninsula a certain car in said train had a "hot box", and said train was standing upon a main track of said railroad there, and the plaintiff, preparatory to taking said car with said "hot box" from said train and placing it upon a sidetrack there, detached an engine from the front end of said train and caused said engine to back upon a sidetrack alongside of said standing train there, and the plaintiff rode upon the footboard at the rear of the tender of said engine and upon the end of said footboard nearest to said standing train of cars there, and he continued to ride upon said footboard there until said engine in backing upon said sidetrack approached near to the car with said "hot box"; that said engine was then running slowly, and it was dark; and the plaintiff was then and there physically and mentally exhausted and nervous, his senses were dulled and his judgment was impaired on account of his excessive and continuous employments aforesaid and the lack of rest and sleep necessarily incident thereto, and while in this condition and for the purpose of uncoupling the car with said "hot box" from said train, he stepped off from said footboard there towards said train and between said sidetrack and said main track, and by reason of the premises he was unable to observe the dangers to him there
18 and as a direct result of the wrongful and unlawful conduct of the defendant in requiring and permitting the plaintiff to work as aforesaid he was in stepping between said tracks there caught between said train and said moving engine and then and there thereby greatly injured; one of his arms was necessarily amputated; his back was broken, divers bones of his body were dislocated and broken; divers muscles, ligaments, membranes, nerves, blood

vessels and tissues of his body were sprained, torn, cut, bruised and injured; divers organs of his body were displaced, bruised, torn and injured and their functions impaired; his brain and nervous system were greatly shocked and injured and their functions impaired; and by reason thereof he became sick, sore, lame and disordered, and has so remained from thence hitherto; and he has suffered great pain and anguish by reason of said injuries, and in the future will continue to suffer therefrom; and he has by reason of said injuries expended and necessarily incurred great liability and indebtedness, to-wit, Three Thousand Dollars ($3000), in endeavoring to be cured of his said injuries; and he has also been unable to work, and will in the future be unable to pursue his usual occupation, and he has by reason thereof lost a large amount in wages and earnings, and in the future will continue by reason thereof to lose his earnings and wages.

5th Count.

For that whereas, also, to wit, on the 19th, 20th, 21st, 22nd and 23rd days of August, 1913, the defendant was a common carrier engaging in interstate commerce by railroad between certain States of the United States, including the States of Ohio and Pennsylvania; and the plaintiff was then and there employed by such carrier in such commerce, and in such employment he was engaged in and connected with the movement of freight train as a conductor of such trains; that on the 19th and 20th days of August, 1913,
19 he was in the course of his said employment required and permitted by the defendant to be and remain on duty for a longer period than sixteen consecutive hours, and on the 20th day of August, 1913, after the plaintiff had been on duty as aforesaid for more than sixteen consecutive hours, the defendant did not permit him to have at least ten consecutive hours off duty, but required and permitted him to return to work within less than ten hours, and thereupon, immediately following and on August 20th, and August 21st, 1913, required him to remain on duty again for a longer period than sixteen consecutive hours; and thereupon, on August 21st, 1913, at the end of the second period of more than sixteen hours on duty aforesaid, the defendant did not permit the plaintiff to remain off duty for a period of ten consecutive hours, but required and permitted him to return to work within less than ten hours, and on the 21st and 22nd of August, 1913, again required and permitted the plaintiff to remain on duty for a longer period than sixteen consecutive hours, so that by reason of the wrongful and unlawful conduct of the defendant the plaintiff became nervous and exhausted, his senses became dulled and his judgment impaired, and while he was in this condition, shortly after midnight and on the 23rd day of August, 1913, he was required and permitted by the defendant to take charge of a freight train bound from Cleveland, Ohio, to New Castle Junction, Pennsylvania; and the plaintiff took charge of said train and ran the train on said trip as far as Peninsula, Ohio, and said train was there brought to a standstill upon the main track there, and the plaintiff detached an

engine from said train and caused said engine to back in and along a sidetrack there for the purpose of proceeding to the other end of said train and for the purpose of detaching a car from said train;

that said sidetrack was next to and adjoining the said main
20 track upon which said train was then and there standing;

that as said engine backed along said sidetrack the plaintiff rode upon the footboard at the rear of the tender of said engine and on the end of said footboard nearest to said train, and that as said engine approached upon said sidetrack near to the car of said train which the plaintiff was about to detach therefrom the plaintiff then and there by reason of the unlawful conduct of the defendant in requiring him to work in violation of the law as aforesaid, and by reason of his nervous and exhausted condition as aforesaid, was unable to observe accurately the conditions attending him there and he stepped off from said footboard of said engine towards said train and between said track and said sidetrack and was then and there caught between one of the cars of said train and said moving engine and as a direct result of the unlawful conduct of the defendant aforesaid he was then and there by reason of the premises greatly injured; one of his arms was necessarily amputated; his back was broken; divers bones of his body were dislocated and broken; divers muscles, ligaments, membranes, nerves, blood vessels and tissues of his body were sprained, torn, cut, bruised and injured; divers organs of his body were displaced, bruised, torn and injured and their functions impaired; his brain and nervous system were greatly shocked and injured and their functions impaired; and by reason thereof he became sick, sore, lame and disordered, and has so remained from thence hitherto; and he has suffered great pain and anguish by reason of said injuries, and in the future will continue to suffer therefrom; and he has by reason of said injuries expended and necessarily incurred great liability and indebtedness, to wit, Three Thousand Dollars ($3,000), in endeavoring to be cured of his said injuries; and he has also been unable to work, and will in the future be unable
21 to pursue his usual occupation, and he has by reason thereof lost a large amount in wages and earnings, and in the future will continue by reason thereof to lose his earnings and wages.

To the damage of the plaintiff in the sum of seventy five Thousand Dollars ($75,000) and therefore *he* brings his suit.

WEYMOUTH KIRKLAND,
C. E. STENNING,
MORSE IVES,
Attorneys for Plaintiff.

Filed April 10th, 1914, 3:40 P. M.

22 And afterward to-wit, on the 16th day of April A. D. 1914 a certain plea was filed in the office of the Clerk of said Court, in words and figures following, to-wit:

23 STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

B-2107.

JAMES B. WILSON
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation.

And now comes the Baltimore and Ohio Railroad Company, defendant in the above entitled cause, by Calhoun, Lyford & Sheean, its attorneys, and defends the wrong and injury, when, etc., and as to the declaration filed herein, and each and every count thereof, says that it is not guilty of the said supposed grievances therein laid to its charge, or any or either of them, or any part thereof, in manner and form as the plaintiff hath thereof complained against it; and of this the said defendant puts itself upon the country, etc.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By CALHOUN, LYFORD & SHEEAN, *Its Attorneys.*

24 And afterwards to wit, on the 22nd day of April A. D. 1914 a certain similiter was filed in the office of the Clerk of said Court, in words and figures following to-wit:

25 STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

B-2107.

JAMES B. WILSON
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation.

And the plaintiff, as to the plea of the defendant by it herein filed on April 16th, 1914, and whereof it puts itself upon the country, does the like.

WEYMOUTH KIRKLAND,
C. E. STENNING,
MORSE IVES,
Attorneys for Plaintiff.

26 And afterwards to wit on the 13th day of June A. D. 1914 the following proceedings were had and entered of record in said cause to wit:

27 JAMES B. WILSON
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

On motion of attorney for plaintiff it is ordered that leave be and the same is hereby given the plaintiff to file instanter additional counts herein and it is further ordered that the defendant be and it is hereby required to plead thereto within ten days from this date.

28 And afterwards on the same day, to-wit, on the 13th day of June A. D. 1914 certain additional counts were filed in the office of the Clerk of said Court, in words and figures following to-wit:

29 STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court Thereof.

B-2107.

JAMES B. WILSON, Plaintiff,
vs.
BALTIMORE & OHIO RAILROAD COMPANY, a Corporation, Defendant.

James B. Wilson, plaintiff, by Morse Ives, Weymouth Kirkland and C. E. Stenning, his attorneys, by leave of court first had and obtained, files this additional count to the plaintiff's declaration, and complains of the Baltimore & Ohio Raliroad Company, a corporation, defendant, of a plea of trespass on the case:

For that whereas on, to wit, the 19th, 20th, 21st, 22nd and 23rd days of August, 1913, the defendant was a common carrier engaging in interstate commerce by rail road between certain states of the United States, including the states of Ohio and Pennsylvania; and the plaintiff was then and there employed by such carrier in such commerce, and in such employment he was engaged in and connected with the movement of freight trains as conductor of such trains; that commencing on the afternoon of August 19th, 1913, at to wit, 3:30 o'clock P. M. and within the 24-hour period immediately following, the plaintiff was on duty in his said employment in the aggregate more than 16 hours, and after said plaintiff had been on duty as aforesaid in the aggregate for more than 16 hours in said 24-hour period, the defendant wrongfully and in violation of law required and permitted the plaintiff to continue and again go on duty in his said employment without having had at least 8 consecutive hours *of* duty; that thereafter, on August 20th, 1913,
30 commencing at, to wit, 3:15 o'clock P. M., and within the 24-hour period immediately following, the plaintiff was on duty in his said employment in the aggregate more than 16 hours, and after said plaintiff had been on duty as aforesaid in the aggregate for more than 16 hours in said 24-hour period, the defendant wrong-

fully and in violation of law required and permitted the plaintiff to continue and again go on duty in said employment without having had at least 8 consecutive hours off duty; that thereafter, on August 21st, 1913, commencing at, to wit, 4:15 o'clock P. M., and within the 24-hour period immediately following, the plaintiff was on duty in his said employment in the aggregate more than 16 hours, and after said plaintiff had been on duty as aforesaid in the aggregate for more than 16 hours in said 24-hour period, the defendant wrongfully and in violation of law required and permitted the plaintiff to continue and again go on duty in said employment without having had at least 8 consecutive hours off duty; so that, by reason of the several violations of law by the defendant as aforesaid, the plaintiff became nervous and exhausted, his senses became dulled and his judgment impaired, and while he was in this condition, shortly after midnight, and on the 23rd day of August, 1913, he was required and permitted by the defendant to take charge of a freight train bound from Cleveland, Ohio, to and through New Castle Junction, Pennsylvania, and the plaintiff took charge of said train and ran said train on said trip as far as Peninsula, Ohio, and said train was there brought to a standstill upon the main track there, and the plaintiff caused an engine to be detached from said train, and caused said engine to back in and along a side track there for the purpose of proceeding to the other end of said train and for the purpose of detaching a car from said train; that said side track was next to and adjoining the said main track upon which said train was then and there standing; that as said
31 engine backed along said side track the plaintiff rode upon the footboard at the rear of the tender of said engine and on the end of said footboard nearest the said train, and that as said engine approached upon said side track near to the car of said train which the plaintiff was about to detach therefrom, the plaintiff then and there, by reason of the several violations of law of the defendant, aforesaid, and by reason of his nervous and exhausted condition as aforesaid, was unable to protect himself from injury there, and he stepped off from said footboard of said engine towards said train and between said main track and said side track, and he then and there struck against one of the cars of said train and was thrown against and under said moving engine, and as a direct result of the several violations of law of the defendant aforesaid he was then and there by reason of the premises greatly injured: one of his arms was necessarily amputated; his back was broken; divers bones of his body were dislocated and broken; divers muscles, ligaments, membranes, nerves, blood vessels and tissues of his body were sprained, torn, cut, bruised, and injured and their functions impaired; his brain and nervous system were greatly shocked and injured and their functions impaired; and by reason thereof he became sick, sore, lame and disordered, and has so remained from thence hitherto; and he has suffered great pain and anguish by reason of said injuries, and in the future will continue to suffer therefrom; and he has by reason of said injuries expended and necessarily incurred great liability and indebtedness, to-wit, Three Thousand Dollars ($3,000), in endeavor-

ing to be cured of his said injuries, and he has also been unable to work, and will in the future be unable to pursue his usual occupation, and he has by reason thereof lost a large amount in wages and earnings, and in the future will continue by reason thereof to lose his earnings and wages.

To the damage of the plaintiff in the sum of Seventy-five Thousand Dollars ($75,000) and therefore he brings his suit.

MORSE IVES,
WYMOUTH KIRKLAND, &
C. E. STENING,
Attorneys for Plaintiff.

32 And afterwards, to-wit: on the 23rd day of June A. D. 1914 a certain plea was filed in the office of the Clerk of said Court, in words and figures following to-wit:

33 STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Said County.

B-2107.

JAMES B. WILSON
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

And now comes the Baltimore and Ohio Railroad Company, defendant in the above entitled cause, by Calhoun, Lyford & Sheean, its attorneys, and defends the wrong and injury, when, etc., and as to the additional count filed herein, says that it is not guilty of the said supposed grievances therein laid to its charge, or any or either of them, or any part thereof, in manner and form as the plaintiff hath thereof complained against it; and of this the said defendant puts itself upon the country, etc.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By CALHOUN, LYFORD & SHEEAN,
Its Attorneys.

34 And afterwards, to-wit on the 2nd day of July A. D. 1914 the following proceedings were had and entered of record in said Court to-wit:

35 B-2107. Case.

JAMES B. WILSON
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

This cause being called for trial come the parties to this suit by their attorneys respectively and issues being joined herein it is ordered that a jury come

Whereupon come the jurors of a jury of good and lawful men to-wit:

Earl Viets,
David J. Fireman,
August Barstitk,
Alex Boyd,
Alfred Hendrickson,
N. P. Stind,
Edmond Taubert,
Luke T. Prouty,
Joseph B. Slevin,
Fred L. Wood,
L. S. Alrich,
Paul T. Zimmerman,

who being duly elected tried and sworn well and truly to try the issues joined herein and a true verdict render according to the evidence and the hour for adjournment having arrived it is ordered that said jury be and they are hereby permitted to separate until ten o'clock tomorrow morning.

36 And afterwards, to-wit on the 3rd day of July A. D. 1914 the following proceedings were had and entered of record in said Court to-wit:

37 Case. B-2107.

JAMES B. WILSON
vs.
BALTIMORE AND OHIO RAILROAD COMPANY.

This day again come the parties to this suit by their attorneys respectively and the jury heretofore impanelled herein for the trial of said cause also come and the hour for adjournment having arrived it is ordered that said jury be and they are hereby permitted to separate until ten o'clock Monday morning July 6, A. D. 1914.

38 And afterwards, to-wit on the 6th day of July A. D. 1914 the following proceedings were had and entered of record in said Court to-wit:

39 Case. B-2107.

JAMES B. WILSON
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

This day again come the parties to this suit by their attorneys respectively and the jury heretofore impanelled herein for the trial

of said cause also come and after hearing all the evidence adduced say:

We the jury find the defendant guilty and assess the plaintiff's damages at the sum of forty five thousand dollars.

Whereupon the defendant enters herein its motion for a new trial in said cause.

40 And thereupon, on the same day, to-wit: the 6th day of July A. D. 1914 a certain verdict was filed in the office of the Clerk of said Court, in words and figures following to-wit:

We the jury find the defendant guilty and assess the plain-

41 tiff's damages at the sum of $45,000 (Forty five thousand)

AUGUST BARSTITH, *Foreman.*
EDMUND TAUBERT,
NICHOLAS STIND,
ALEX BOYD,
LUKE T. PRUNTY,
P. T. ZIMMERMAN,
DAVID J. FIREMAN,
EARL VITTS,
L. S. ALDRICH,
ALFRED G. HENDRICKSON,
FRED L. WOOD,
JOSEPH B. SLEVIN.

42 And afterwards, to-wit: on the 27th day of July A. D. 1914 the following proceedings were had and entered of record in said Court to-wit:

43 Case. B-2107.

JAMES B. WILSON
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

This cause coming on to be heard upon the motion of the defendant and heretofore entered herein for a new trial in this cause after arguments of counsel and due deliberation by the Court it is ordered that said motion be and the same is hereby overruled and a new trial denied.

Whereupon the defendant enters herein his motion in arrest of judgment which motion is likewise overruled and denied.

Therefore it is considered by the court that the plaintiff do have and recover of and from the defendant his said damages of forty five thousand dollars in form as aforesaid by the jury assessed together with his costs and charges in this behalf expended and have execution therefor.

Whereupon the defendant having entered its exception herein prays an appeal from the judgment of this court to the Appellate Court in and for the First District of the State of Illinois which appeal is allowed upon the defendant filing herein its appeal bond in the penal sum of fifty thousand Dollars within sixty days from this

date said bond to be approved by the Clerk of this Court and ninety days time from this date is allowed the defendant within which to file its bill of exceptions herein.

$45,000.00.

44 And afterwards to-wit on the 2nd day of September A. D. 1914 a certain appeal bond was filed in the office of the Clerk of said Court, in words and figures following to-wit:

45 Know all men by these presents, That we, The Baltimore and Ohio Railroad Company, a corporation, and National Surety Company of New York are held and firmly bound unto James B. Wilson, of Lancaster, Pennsylvania in the penal sum of Fifty Thousand ($50,000) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, successors and administrators, jointly, severally and firmly, by these presents.

Witness our hands and seals this 12th day of August A. D. 1914.

The condition of the above obligation is such, That whereas, the said James B. Wilson did, on the 27th day of July A. D. 1914, in the Circuit Court of Cook County, in the State aforesaid, and of the July Term thereof, A. D. 1914, recover a judgment against the above bounden The Baltimore and Ohio Railroad Company for the sum of Forty-five thousand ($45,000) Dollars and — Cents, besides costs of suit; from which said judgment of the said Circuit Court of Cook County, the said The Baltimore & Ohio Railroad Company has prayed for and obtained an appeal to the Appellate Court, within and for the First District in said State:

Now, therefore, if the said The Baltimore and Ohio Railroad Company shall duly prosecute its said Appeal with effect, and moreover pay the amount of the judgment, costs, interests, and damages rendered and to be rendered, against it in case the said judgment shall be affirmed in the Appellate Court; then the above obligation to be void, otherwise to remain in full force and virtue.

46 THE BALTIMORE AND OHIO RAILROAD COMPANY,

By CHARLES D. CLARK, [SEAL.]

Its Attorney in Fact.

NATIONAL SURETY COMPANY, [SEAL.]

By JAMES FAWKUER,

Resident Vice-President.

Attest:

EMIL L. LEDERER, [SEAL.]

President *Assistant Secretary.*

Approved this 2nd day of September A. D. 1914.

JOHN W. RAINEY, *Clerk.*

O. K.,

MORSE IVES,

Att'y for Jas. B. Wilson.

47 And afterwards, to wit, the 26th day of September A. D. 1914 a certain bill of exceptions was filed in the office of the Clerk of said Court, in words and figures following to-wit:

48 STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

Gen. No. —. Term No. —.

JAMES WILSON
vs.
BALTIMORE & OHIO RAILROAD COMPANY.

Before Judge Oscar E. Heard, July 2, 1914.

Bill of Exceptions.

Filed Sep. 26, 10:29 A. M., 1914.
JOHN W. RAINEY, *Clerk,*
By GILFOIL, *Deputy.*

49 *Witness Index.*

	D.	C.	R. D.	R. C.
Thomas Delaney				
James Wilson				
(Recalled:)				
James Whitney Hall.....				
William O. Krohn.....				
Depositions of:				
"George Huber".....				
"George Bergdorff".....				
"P. L. Williams".....				
"H. D. Mathews".....				
"Guy F. Briggs".....				
"Hiram Cearfoss".....				
Louis Thexton.....				
Otto C. Stieth				
John R. Van Winkle.....				
Howard B. Miller.....				
Stephen O. Lewis.....				
Henry H. Smith.....				
S. M. Stewart.....				

50 STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

Gen. No. —. Term No. —.

JAMES WILSON
vs.
BALTIMORE & OHIO RAILROAD.

Bill of Exceptions.

Be it remembered that on the trial of the above entitled case, before the Honorable Oscar E. Heard, sitting as one of the judges of said court, and a jury, on the 2nd day of July A. D. 1914, the same being one of the days of the June 1914 Term of said court, the parties to maintain the issues on their parts respectively, introduced the following evidence, and the following proceedings were had:

Appearances:

Mr. Morse Ives, Mr. C. E. Stenning, and Mr. Weymouth Kirkland, of Rose, Symmes, & Kirkland, on behalf of the plaintiff;
Mr. James M. Sheean, and Mr. Charles D. Clark, of Calhoun, Lyford & Sheean, on behalf of the defendant.

51 July 2nd, 1914—2 p. m.

Court met pursuant to recess.
Present: Same as before.
Mr. Sheean: Your Honor, one of our witnesses has had a sudden death in the family, and with Mr. Ives' consent I will call him out of order without prejudice; just a short matter that I want to prove by him.
The Court: Now, Mr. Delaney, speak up loud enough so the gentleman in the far corner hears every word you say, and, gentlemen of the jury, it is your duty and privilege to hear and understand every word that is said by every witness; it is your duty immediately and at any time you don't hear what the witness says to speak up and ask to have it repeated; that will be done for your benefit. If at any time you don't understand the meaning of what the witness says, it is your duty to speak up and ask to have the witness explain the meaning of what he said, so that you may hear, know, and understand everything as we go along. Proceed.

52 THOMAS DELANEY, a witness called on behalf of the Defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Sheean:

Q. State your name?
A. Thomas Delaney.

Q. where do you live, Mr. Delaney?
A. Akron.
Q. Ohio?
A. Yes Sir.
Q. What is your line of work?
A. Supervisor.
Q. Supervisor, with what company?
A. The B. & O.
Q. And on what division, or between what points is your territory?
A. Cleveland Division, between Valley Junction and Cleveland.
Q. And on that division is the town of Peninsula situated?
A. Yes Sir.
Q. Are you familiar with the situation at the town of Peninsula?
A. Yes, Sir.
Q. And how long have you been familiar with the situation as to the number and distance of tracks there at that point?
A. Since '79.
Q. And is that when the road was built?
A. Along in '78 and '79 the road was built.
Q. And during all that period of time how many tracks—first, is that a single or double track railroad?
53 A. Single track.
Q. And just west or just north of the town of Peninsula what other tracks are there there?
A. There is a couple of sidings there just north.
Q. And on which side of the main track?
A. On the right side of the main track?
Q. On the righthand side going west. Now do you know what the distance between centers of the main track and the track next east of that next adjoining track is?
A. 12-foot centers.
Q. 12-foot centers. Were you connected with that road and did you have charge of that division of the time of the floods of April 1913?
A. Yes, sir.
Q. And how long a period of time elapsed there when traffic was—traffic ceased entirely there?
A. Well, I am not positive, 16 or 18 days, I can't tell just which.
Q. Now you know the location of those tracks as they are the present time, do you Mr. Delaney?
A. Yes, Sir.
Q. You haven't made any specific measurements of them?
A. No, sir.
Q. What is the fact as to whether those tracks now are the same distance apart as they were in August 1913?
54 A. They are the same distance.
Q. There has been no change in the alignment of those tracks in that time?
A. No, sir.

Q. How long have those three tracks been there, Mr. Delaney, at that point?
A. That siding?
Q. Yes?
A. It was built along about the time we built the main track.
Q. I didn't hear that.
A. About the time we built the main track, along about '78 or '79.
Q. And has the distance between centers remained the same all the time there?
A. Yes, Sir.
Q. There has been no change in the alignment of the track?
A. No, sir.

Mr. Sheean: That is all.

Cross-examination by Mr. Ives:

Q. How long have you been supervisor there, Mr. Delaney?
A. Let's see, since '79.
Q. 1879?
A. Yes, sir.
Q. You were there when the track was built to Peninsula?
A. Yes, sir.
Q. Has the track been relaid since '79?
A. Relaid? Well it was relaid. That is, new rails put on.
Q. Any difference in distance between '79, from then until now?
A. No, sir.
55 Q. Is that siding the same distance from the main track all the way up from the south end to the north end?
A. No, Sir.
Q. What difference is there?
A. Well, I couldn't—I didn't take any measurements, but I know there is some difference.
Q. Did you ever make a measurement of the track there?
A. That track?
Q. Yes?
A. Not of those measurements.
Q. What?
A. Not since they were laid.
Q. Did you make any measurements when they were laid?
A. When they were laid they were laid 12 foot centers.
Q. Did you make the measurements then?
A. Yes, Sir.
Q. Now, since this accident to Wilson you have been there at the Peninsula, haven't you?
A. Yes, sir.
Q. But made no measurements at all?
A. I made one measurement.
Q. When?
A. Along in May, I think.
Q. What was the occasion of you making that measurement?
A. The point I measured was 12 foot centers; that would make 7 feet 4 inches from gauge to *guage*, where I made the measurement.

Q. Where?
A. Along about 8 car lengths west of the frog, or east of the frog.
Q. The tracks run north and south in there, don't they?
56 A. Yes. Well, the B. & O. call them east and west.
Q. Eight car lengths——
A. Eight car lengths south of——
Q. —south of the north frog.
A. Yes, sir.
Q. And by that you mean the frog at the north switch of the passing track?
A. Yes.
Q. And at that point it was 12 feet apart from center to center?
A. No, back of the frog it had a clearance.
Q. I know. Eight car lengths?
A. Yes.
Q. South of that frog?
A. Yes, south of that.
Q. It was 12 feet from center to center?
A. Eight cars south of that frog.
Q. And you mean, do you, from the center of the main track to the center of the passing track?
A. Yes, sir.
Q. Why did you make that measurement?
A. Well, I don't know.
Q. How?
A. I was requested to make the measurement to see what distance they were.
Q. Did you make the measurement with reference to this case of Wilson's?
A. No, sir.
Q. Don't you know that about 13 or 14 car lengths south of that frog at the present time it is considerably shorter than 12 feet from center to center?
A. It can't be very much.
Q. Don't you know that 25 or 30 car lengths south of that
57 frog it is at least, or about a foot wider from center to center than it is 13 or 14 car lengths south of that frog at the present time?
A. Yes, it is wider.
Q. It is wider?
A. Yes, sir.
Q. So those car tracks are not 12 feet from center to center, the whole length of the sidetrack, are they?
A. Not the whole length, no.
Q. Were they an equal distance apart before the flood?
A. Practically where they are laid now.
Q. So they were an uneven distance apart before that, were they?
A. They were in a little better alignment than they are at present.
Q. When those tracks were laid in '79 when you made measure-

ments there yourself, did you lay tracks there at that time that were not in alignment?

A. I presume so.

A. At one part of the track that is 13 or 14 feet from the frog, it would be a foot—they would be a foot closer together than they would be a little further on to the south, is that true?

A. Why, I am not positive how wide they are there.

Q. Isn't it a fact, Mr. Delaney——

A. I know they are wider; they are wider, I admit that.

Q. Isn't it a fact that that difference in alignment came after the flood?

A. After the flood?

58 Q. Yes?

A. I didn't catch you.

Q. I say, isn't——

The Court: Read the question to him.

(Question read.)

A. After the flood, yes.

Mr. Ives:

Q. You say "Yes"?

A. No, the alignment was the same before the flood, but that track washed down on to the main track, and it was shoved back at that point.

Mr. Ives: That is all.

Redirect examination by Mr. Sheean:

Q. Mr. Delaney, I forgot to ask you whether that track along there where the siding is, whether it is a straight track or a curve?

A. It is on a curve.

Q. What is it?

A. On a slight curve.

Q. On a slight curve?

A. Yes, sir.

Q. Curving in what direction?

A. Curving to the left.

Q. As you go——

A. As you go west, going to Cleveland—north, rather.

Q. Now, how is the main track with reference to the rails, are they laid on the same level or is one rail higher than the other?

A. Why, there is about, I think, three inches elevation.

59 Q. That is, the outer rail is higher than the inner rail on the main track?

A. Yes, sir.

Q. And that is on the curve?

A. Yes, sir.

Q. That is the usual way of having the rails where there is a curve, isn't it, to have the outer rail higher than the inner rail?

A. Yes, sir.

Q. Now, how is it with reference to the sidings there on the part opposite this curve on the main track, are the rails there elevated or all on the same level?
A. They are practically flat.
Q. Flat?
A. Yes, sir.

Mr. Sheean: That is all.

Recross-examination by Mr. Ives:

Q. That curve, Mr. Delaney, is all at the north end of that siding, isn't it?
A. Yes, sir.
Q. And when you go 14 feet or 14 car lengths south from the frog there, for the rest of that main track and the rest of the siding there there is no curve at all, is there?
A. Not very much.
Q. For three quarters of the distance of that siding there is no curve, is there?
A. No.

Mr. Ives: That is all.
The Witness: But the elevation, recollect, runs out about 150 feet on the tangent.
Mr. Sheean: That is all.
60 Mr. Ives: That is all.
Now, if the court please, may the plaintiff sit where he is while I examine him?
The Court: Yes.

JAMES WILSON, plaintiff in the above entitle- case, having been first duly sworn, testified as follows:

Direct examination by Mr. Ives:

Q. State your name, Mr. Wilson?
A. James Wilson.
Q. Where do you live?
A. Newcastle, Pennsylvania.
Q. How long have you lived there?
A. Seven years.
Q. Newcastle, Pennsylvania?
A. Yes, sir.
Q. What has been your occupation
A. Railroad man, brakeman and conductor.
Q. How old are you?
A. Twenty nine years old.
Q. When will you be thirty?
A. The 14th day of August.
Q. When did you first commence to work for the defendant, the Baltimore & Ohio Railroad Company?
A. June the 11th, 1907.

Q. And what work did you do then?
A. I was extra brakeman.
Q. How long did you continue as an extra brakeman?
61 A. About a year.
Q. Then what work did you do?
A. I was regular brakeman.
Q. How long were you regular brakeman?
A. Up until the time I was promoted.
Q. Promoted to what position?
A. To conductor.
Q. And when was that?
A. About four months before.
Q. About four months before you were injured?
A. I don't remember the date, about three months before I was injured.
Q. And after you were promoted to a conductor what were your average earnings in your employment?
A. $125 a month, the average.
Q. As a conductor over what line of road did you run?
A. Newcastle division.
Q. And where are the limits of that division?
Q. Newcastle Junction, Pennsylvania, and Chicago Junction, Ohio.
Q. How long a distance is that?
A. 147 miles.
Q. Are there any other tracks that are part of that division except the direct line between those towns?
A. From Youngstown to Painesville.
Q. And how far was that?
A. About 86 miles.
Q. And did you run over any other divisions as a conductor before the time you were injured?
62 A. I went to Loraine.
Q. What division is that over?
A. That is over the Cleveland division.
Q. And going to Loraine what—how would you get there?
A. Go to Sterling on the Newcastle division, and over the Cleveland division from Sterling to Loraine.
Q. How far over the Cleveland division would you go?
A. Forty miles.
Q. On the 19th day of August in the afternoon, what did you do?
A. I was called at 2:15.
Q. Who called you?
A. The call boy of the Baltimore & Ohio.
Q. What were the duties of the call boy?
A. To call train crews to go to work.
Q. And when he did that work, calling the train crews, what else did he do usually?
A. Well, he would sign the time slips for you.
Q. When he called you on that day did he give you any information as to what you were to do?

A. He told me I was to go west on No. 13 and meet the crew coming east.
Q. And what time was 13 due to go west?
A. Due at Newcastle Junction at 4:15 P. M.
Q. And was No. 13 a passenger or freight train?
A. A mail train.

Q. After you were called by the call boy on that day what
63 did you do?

A. My wife packed my lunch and I went down on the train to Newcastle Junction.
Q. What time did you get to Newcastle Junction?
A. 3:40 P. M.
Q. Was there any rule or were you ever given any instructions in regard to reporting for duty in reference to the time that you were called?
A. Yes, sir.
Q. What was the rule or what were your instructions?

Mr. Sheenan: That is objected to. If it is covered by a rule, I suppose the rule will be the best evidence of it.
The Court: Find out whether it is a printed rule.
Mr. Ives: I will withdraw the *rule*.

Q. Were you ever given any instructions in regard to it?
A. Yes, sir.
Q. And who gave you instructions?
A. The trainmaster, assistant trainmaster.
Q. And what instructions did he give you?

Mr. Sheean: That is objected to. No authority as yet shown that the trainmaster has authority to give instructions binding on the defendant.

Mr. Ives:

Q. What were the duties of the trainmaster?
A. To instruct his brakemen.
Q. And what else?
A. See that they done the work properly.

Q. And where was he stationed?
64 A. New Castle Junction.

Q. And were there any other—was there any other person there giving orders other than the trainmaster?
A. The yardmaster would give orders.
Q. Do you know what the division of work was between those men, the trainmaster and the yardmaster?
A. The yardmaster handled the yard men, and the trainmaster handled the train men.
Q. Who was your superior there, who gave orders?
A. The trainmaster.
Q. Was there any other person there who gave you orders except the trainmaster?
A. The superintendent give me orders.

Q. And who give you orders in reference to the time for reporting, and your duties?

A. The trainmaster.

Q. Always?

A. He did me.

Q. Now tell what instructions, if any, the trainmaster had given you with regard to reporting for work there.

A. He instructed me to go down there and be ready to leave by the time I was called to leave.

Q. And before the date, that is, before the 19th of August, what had been your practice or custom under these instructions?

A. Doing that, getting down there and getting ready to leave.

Q. Usually how much time, how long a time would you report before the time that you were called to leave?

65 A. I usually reported as soon as I could after I was called.

Q. And usually how long would that be?

A. It would be from 45 to an hour, 45 minutes to an hour.

Q. On the 19th I understood you to say you reported at 3:40?

A. Yes, sir.

Q. And when you reported there what did you do?

A. I went to the telegraph office and left my basket.

Q. Then what did you do?

A. I went from there to the roundhouse where the call boy is located.

Q. And tell what you did there, all that you did there?

A. I asked him who the crew was, and he told me, and I also had him sign the time slip—he gave me a time slip and I signed it.

Q. What was this time slip?

A. It was a form they used to turn in the time, the time sheet.

Q. The time you started and the time you quit work?

A. Yes, sir.

Q. And did you do anything else there at the roundhouse this day?

A. That is all I did at the roundhouse that day.

Q. Then what did you do?

A. I went to the telegraph office and looked at the general orders, see if I could find any new general orders.

Q. Where there any general orders there that day, any new ones?

A. Yes, sir.

Q. There was one, and what else did you say?

66 A. I signed that general order, read it over very carefully.

Q. Had you ever received any instructions previous to this time in regard to examining the book and signing new general orders?

A. Yes, sir.

Q. What were your instructions?

A. To read my general orders every trip before I went out.

Q. And who were the instructions given to you by?

A. The trainmaster.

Q. And after you read this general order and signed it there at the telegraph office on that day, what did you do?

A. I went up to the operator, the operator was upstairs, and asked him if he knew how 13 was, if she was on time, and he told me he heard it was a little late.

Q. Then what did you do?

A. Then I went down and got my basket and walked down to the station and waited till 13 came in.

Q. What time did you reach the station, do you know?

A. About the time she was due to leave there.

Q. And how late was that train on that day?

A. About an hour late.

Q. And you took that train and left on it an hour, that is, about an hour after it was due?

A. Yes, sir. 5:15.

Q. At the time you left there did you know where you were going to?

A. No.

Q. What were your instructions as to what you were to do?

67 A. Go out on 13 and meet the crew coming east.

Q. How did you know or how did you understand at that time that the crew knew you were to get off from this No. 13?

A. The conductor on 13 would notify them to get off.

Q. Do you know how he would notify them?

A. The train dispatcher would notify him.

Q. And where was the train dispatcher located?

A. New Castle Junction.

Q. How far did you ride on No. 13?

A. I rode to Ohio Junction, Ohio.

Q. What happened when you reached there?

A. I took charge of the east bound freight train.

Q. What notice did you get there that you were going to get off, how did you happen to get off your train there?

A. The crew on 13 told me to get off there.

Q. Was your crew with you?

A. Yes, sir.

Q. Who was your crew at that time?

A. I don't recall the men; I can't think of their names.

Q. Where were you ordered to get off from No. 13?

A. I was ordered at Ohio Junction.

Q. What time did you get off No. 13?

A. 6:05.

Q. And how soon after 6:05 did you take charge of the train there?

A. I took charge at 6:05.

Q. And you found your train at Ohio Junction?

A. Yes, sir.

68 Q. And after you took charge of it, what did you do?

A. I called up the operator over the telephone at Ohio Junction, which is about three miles west of it. I told him I had four cars to set off at Ohio Junction. In order to do that I had to go back to the main track and set them off, and I would have to

get permission off of him to get on the main track and go back and set them off.

Q. How long were you there at Ohio Junction?

A. I left there at 11:05.

Q. What were you doing between 6:05 and 11:05?

A. Went back and set those cars off, and was there at the telephone trying to get out.

Q. Did you have charge of this train during all that period?

A. Yes, sir.

Q. After you left there at 11:05 P. M., what did you do?

A. Went to New Castle.

Q. What time did you arrive at New Castle Junction?

A. I got into the yards at 2:45.

Q. Did you arrive at New Castle Junction before you got into the yards?

A. Yes, sir.

Q. How long before?

69 A. About an hour.

Q. What were you doing that hour?

A. I went down to see the yardmaster, to see if we couldn't get in. They told me he was out there somewhere.

Q. After you got into the yard, what did you do?

A. I went to the round house.

Q. And what did you do there?

A. I registered on the interstate book.

Q. What sort of a book is that?

A. That is the book where you keep the record of your trip.

Mr. Sheean: Mr. Ives, it has been suggested to me that all of these matters are covered by the stipulation. I have not looked at that, but the whole thing is in the stipulation, is it not?

Mr. Ives: Some, but not the whole thing.

Mr. Sheean: Well, what you have got down to thus far.

Mr. Ives: This very thing I am asking him about now is not in the stipulation.

Mr. Sheean: All right.

Mr. Ives:

Q. How long were you there in the yard that night, after you got in there at 2:45?

A. I was called again about four o'clock.

Q. And during that period between 2:45 and four o'clock what were you doing?

A. I was registering at the round house on the interstate book.

70 Q. What else?

A. I had my time slip signed and mailed.

Q. Then what did you do?

A. I went to the yard office and gave the yard master the bill for the train and signed the wheel report.

Q. What did you say in regard to your bills and wheel report?

A. I gave them to the yard master.

Q. What did your bills consist of?
A. We get a bill for each car, the lading, and where it goes to.
Q. Did you have to do anything in regard to those bills, make any reports, or writing in reference to them?
A. I would get the numbers off the bills and put them on the wheel report, as to where the cars should go.
Q. And what did you do in regard to those wheel reports when you got into New Castle?
A. I marked the time of arrival at New Castle Junction, signed my name to it, and gave it to the yard master.
Q. How much time elapsed while you were doing this, registering and making these visits to the telegraph office and round house, and making these reports after you got in?
A. May be 45 minutes.
Q. Then after the la*sp*- of that forty-five minutes, what did you do?
A. I went down on 97's*a* caboose, dead-headed west, and relieved the crew coming east.
71 Q. You went west on a freight train?
A. Yes.
Q. And that train was Number 47?
A. That train was number 97.
Q. And how much time elapsed after you returned and got into the caboose, before the train pulled out?
A. When I went on the caboose they were ready, I guess.
Q. What orders did you have as to how far you were to go on 97?
A. I had none.
Q. What were your orders in reference to that trip?
A. To go out on 97, and relieve a crew coming east.
Q. How far did you ride on 97?
A. To Ohio Junction.
Q. And will you state the time that you left Newcastle Junction?
A. Four o'clock.
Q. What time did you arrive at Ohio Junction?
A. 5:15.
Q. When you reached Ohio Junction, what did you do?
A. I went to the office, the telegraph office, and asked the operator who I was to relieve, and where *he* was the man I *I* was to relieve.
Q. Did the conductor of 97 tell you to get off?
A. Yes, sir.
Q. Then what did you do after you went out of the telegraph office there?
A. I went down to where the train was coming in, the water plug just west of there.
72 Q. How far west of there?
A. About two city blocks west of there.
Q. Then what did you do?
A. I took charge after I got there.
Q. And then after you took charge, what did you do?

A. Went to Newcastle.
Q. Newcastle Junction?
A. Yes, sir.
Q. What time did you arrive at Newcastle Junction?
A. 10:55.
Q. 10:55 in the forenoon?
A. Yes, sir.
Q. And when you arrived at Newcastle Junction, what did you do then?
A. I went to the round house and registered.
Q. Did you do the same work then that you did when you got there on the previous train?
A. Yes, sir.
Q. And how long a time did it take you on this second train?
A. About 45 minutes.
Q. So that you got out of the yard about 11:40?
A. Yes, sir.
Q. And where did you go?
A. I went home.
Q. What time did you arrive at home?
A. About 12:05.
Q. What did you do then?
A. My wife got dinner ready I ate dinner, and was getting ready to go to bed when I was called.

73 Q. What time were you called on that day?
A. About 2:15.
Q. -hat is, the 20th of August?
A. Yes, sir.
Q. And when you were called on that day, what instructions did you get?
A. To dead head west on Number 13, and relieve a crew coming east.
Q. And what did you do then when you were called?
A. I got ready and came back down to the Junction, Newcastle Junction.
Q. And what time did you report at the yard there at Newcastle Junction?
A. I reported there at 3:15 P. M.
Q. And what did you do after you got there?
A. I went to the round house to find out the crew I was to get out of there.
Q. Did you do the same work you had done on the previous day?
A. Yes?
Q. And about how long did it take you to do it? That is, I mean on the previous day after you were called and reported?
A. I went to the station there and waited until 13 came.
Q. After you had done that work?
A. Yes, sir.
Q. And what time did number 13 come on that day?
A. About 5:15.

74 Q. And then what did you do?
A. I dead headed west on 13.

Q. Did you know how far you were going?
A. No, sir.
Q. How far did you go?
A. I went to Akron Junction.
Q. How far was that?
A. Seventy five miles west of Newcastle.
Q. That was a mail train?
A. Yes, sir.
Q. When you got to Akron Junction, did the conductor tell you to get off again, as before?
A. Yes, sir.
Q. And what did you do when you got over there?
A. I took charge of a freight of 72 cars—62 cars.
Q. What time did you take charge of that freight train?
A. 7:35.
Q. Who was your crew on that day?
A. Cearfoss was the flagman and Obert was the head brakeman.
Q. And did your whole crew go with you on 13 that day?
A. Yes, sir.
Q. Including the engineer and fireman?
A. I don't remember about the engineer and fireman.
Q. After you took charge in Akron, how long was it before you left there?
A. I left there at 11:55.
Q. Between the time you took charge and the time you left what were you doing?
A. I went to the yardmaster's office and asked him where the engine was. The engine was not coupled on the train. He told me they were down in the engine house. The head brakeman was with me and he went down with me to get the engine.
75 The head brakeman didn't know anything about the track and one thing another. In fact he was a new man and didn't know anything at all about where he was going; we went down there and the engineer told me he would have to have coal on the engine, so I had to get coal on the engine, and I had to go and see the yardmaster and tell him we had to have some coal and get him to send some men after it. We went down and got the coal and came back on the train. We had two big engines, and 62 loads of iron.
Q. Go ahead.
A. I went up and got orders and we started to pull. We stalled on the hill. It is a very bad hill, I remember, and we had to back up in the clear again. In order to back up I had to go to the rear end to see the yardmaster and get permission to back up so that we would not hit anything or kill anybody. Then I told the yardmaster, I would have to have another engine, that the two engines we had wouldn't take the train out of there. So he finally gave me a yard engine, which we coupled on and started. We got up the hill a little ways, and we stalled again, had to back up. Akron Junction lays in a hole, right down in a hole. It is uphill both ways,

a very bad hill both ways. The B. & O. runs across the C. A. & C. west of there, with a switch to it. I said we will have to back up, and back on that hill and take a run for this other hill so I called up the C. A. & C. despatcher, and got permission to back
76 over their tracks to take a race for the east side, which we did, and we got up quite a little ways and we stalled again, and it was necessary to back up. I went back and saw the yardmaster and got another engine. He gave me one. That made three engines on the rear end and two on the head. We had two pushing in the first place. I forgot to say that, and we started again for the hill and got up, part way and stalled again, the same thing, and had to back up, so I went and communicated with the C. A. & C. despatcher again and got permission to back up the hill and take a race, which we did, and we got out that train at 11:55.

Q. After you got out of there, where did you go to?

A. We went to Ravenna, Ohio, stopped there for awhile, the first stop.

Q. After that, what did you do?

A. I had two hot boxes. I had one next the caboose, and one on the head end. The one on the head end of the train was the worst. The engineer and head brakeman set that one off, and I fixed the other one next to the caboose.

Q. Then what did you do next?

A. Took one engine off of there and sent it back again. That left me a double train with one engine.

Q. Then what did you do after you got into Newcastle?

A. I proceeded east and they put us in at Niles Junction for the passenger train and a fast freight train. When the fast
77 freight train came along his engine had a hot box on the tank, and we exchanged engines. He gave us his engine and he took ours. After he left we fixed the hot box on the tank, and we left. We went down to Ohio Junction and half of my train was set off there. The half that was set off was on the rear and next the caboose. We started to pull into the yard and we stalled.

Q. What time did you get into Newcastle Junction?

A. 9:10 A. M.

Q. And what time did you get out of the yard?

A. We got out of there at 10:25.

Q. And what were you doing during that period between 9:10 and 10:25?

A. I was registering at the round house, getting the time slips signed, putting in my bills and wheel reports to the yardmaster, and registering at the telegraph office.

Q. Did you make out any extra reports?

A. Yes, sir, made out two.

Q. Were you busy during that period?

A. Yes, sir.

Q. And when you left there at 10:25 where did you go?

A. I went home.

Q. What time did you get home?

A. I got home about 11:15.

Q. And what did you do after you got home?
A. I got dinner.
78 Q. And did you go to bed?
A. Yes, sir.
Q. About what time?
A. About one o'clock.
Q. And how long did you sleep?
A. Until three.
Q. What happened then?
A. I was called at three o'clock.
Q. Did you answer the phone yourself?
A. Yes, sir.
Q. And what instructions did you get at that time?
A. They called me to take a train and go to Lorain, Ohio.
Q. Did you make any record of the time you were called?
A. No, Sir.
Q. Did you have a book in which you made records of the time you were called for?
A. Yes, sir.
Q. Is this the book that you had (showing same to witness)?
A. Yes, sir, that is the book.
Q. Did you make a record in that book of the time you were called for?
A. Yes, sir.
Q. Did you make any other record *of* that time of the time you reported?
A. I made a record on my time book.
Q. And does the record you made on the time book agree with the time there?
A. No, sir.
Q. What is the difference?
A. The time on the time book says 5:30. This says five o'clock, I was called.
Q. Do you know which one of those records is right?
A. No, Sir.
Q. Do you know what you did after you were called on that day?
79 A. I got ready and went to Newcastle Junction.
Q. Do you know what time you went to Newcastle Junction?
A. I got down there at 4:25.
Q. And do you know which train you went on, how you got there?
A. I went down on a train.
Q. And what did you do after you got there?
A. I went to the round house.
Q. What were your orders for that day?
A. To take a train out of Newcastle Junction to Lorain.
Q. Lorain, Ohio?
A. Yes, sir.
Q. And when you reported there that day, what did you do?

A. I went to the round house and found out the names of the crew, found out who the crew were and got my time slips ready.
Q. What else did you do?
A. I went to the yard office and got the bills for the train.
Q. Did you keep busy in preparation for your departure until your train left?
A. Yes, sir.
Q. And what time did your train leave?
A. 6:30.
Q. And what was your train?
A. I had loads and empties, coal and company material, lumber,—just a mixture.
Q. Newcastle Junction is in Pennsylvania, isn't it?
A. Yes, sir.
Q. And Ohio Junction is in Ohio?
A. Yes, sir.
80 Q. And after you left on that train, what did you do? Where did you go?
A. I went to Warwick.
Q. That is, you left at six thirty in the evening?
A. Yes, sir.
Q. What time did you reach Warwick with that train?
A. 6:05 A. M.
Q. Did you have charge of it all the time, this train?
A. Yes, sir.
Q. And when you reached Warwick at 6:05 the next morning, what did you do then?
A. I had ten cars to set off at Warwick. They put us in on a siding. Warwick extends about two miles west of the depot.
Q. That is, the siding did?
A. The siding and the yard.
Q. And how long were you in on that siding?
A. We left there about 10:35.
Q. And what time were you relieved?
A. Ten o'clock.
Q. And who relieved you?
A. John Stewart.
Q. Where was your train? How far from the depot there?
A. Two miles.
Q. Two miles west of the depot?
A. Yes, sir.
Q. Do you know what time Stewart got into Warwick that morning?
A. Stewart went by me; the train he was on -ent by where I was about 8:40.
Q. And how did Stewart get out to where you were?
A. He walked.
81 Q. And where were you when he reached you?
A. I was over at the telephone.
Q. At the west end of the siding?
A. Yes, sir.

Q. You were near the engine of your train?
A. Yes, sir, right near the engine.
Q. And that was about ten o'clock?
A. He came there about ten.
Q. Did you make a record of the time you were relieved there that morning?
A. Not at Warwick.
Q. Did you make a record later?
A. Yes, sir.
Q. And when?
A. We made a record on the way to Cleveland, at 8:45.
Q. Who was with you when you made your record?
A. Stewart.
Q. Stewart, the conductor that relieved you?
A. Yes, sir.
Q. And what time did you record as the time you were relieved?
A. Ten o'clock.
Q. Did you make a record in your book of the time you were relieved?
A. 8:45.
Q. Do you know whether or not Stewart made the same record you did?
A. I couldn't say that he did.
Q. Now, at the time you were relieved there at Warwick were you given any orders or directions?
A. Yes, sir, Conductor Stewart had a message that he would
82 relieve the crew and go to Cleveland.
Q. A telegraph message?
A. Yes, sir.
Q. Did he show you the message?
A. Yes, sir.
Q. And was there any order in that for you?
A. To take the crew they had relieved and go to Cleveland.
Q. And from that time on what did you do?
A. I went to Cleveland in the caboose on that train.
Q. When Stewart relieved you up by the engine, you went back to the caboose did you not?
A. Yes, sir.
Q. And when you got to the caboose, what did you find there?
A. I found Cearfoss, the head brakeman and the fireman there.
Q. The head brakeman's name was what?
A. Van Winkle.
Q. And what kind of caboose was this?
A. A box car.
Q. And were there any bunks in it?
A. There was four. One of them was broken and full of drawbars, knuckles and joints.
Q. And the other three?
A. The other three had cushions in.
Q. And were they occupied when you got there?
A. Yes, sir.

Q. And who occupied then when you got there?
A. The brakeman was on one, the head brakeman was on the other, and the fireman was on the other.
83 Q. When you left on that train for Cleveland what did you do? What did you do on that trip to Cleveland?
A. I stood up on the rear end, on the platform of the caboose and learned the road.
Q. Who was with you there?
A. The engineer.
Q. What was his name?
A. Lewis, S. O. Lewis.
Q. What did you do learning the road?
A. I learned the looks of it, the location of grades, switches, and telegraph offices.
Q. What time did you arrive in Cleveland?
A. 5:10.
Q. What did you do when you got there?
A. I registered, got my time slips signed, and went up town to get something to eat.
Q. What time did you get through *or* your work *with* registering and getting time slips?
A. About 6:10.
Q. And how long were you gone from the yard there?
A. Until seven thirty.
Q. And during that hour and a half, what did you do?
A. Up town getting my supper.
Q. And after supper did you come back right away?
A. Yes, sir.
Q. And when you got back, did you come back to the same caboose you came into Cleveland on?
A. Yes, sir.
Q. The same box car?
A. Yes, sir.
84 Q. And what did you do?
A. Went to bed.
Q. Went to bed at half past seven?
A. Yes, sir.
Q. How long were you in bed there?
A. Until ten o'clock.
Q. What happened then?
A. I was called for Newcastle.
Q. Who called you?
A. The call boy at Cleveland.
Q. Now, what did you do when you were called?
A. I got up and dressed, and cleaned my lantern and put some oil in it and started for the yard.
Q. Then what did you do—What time did you leave Cleveland?
A. About 12:30.
Q. What did you do between the time you were called and the time you left Cleveland?
A. Preparing to leave, getting ready.

Q. What did you do in preparing to leave? Did you do any work?

A. Yes, sir, I went down to the yard office in the caboose to get the bills for the train, found out where the train was, also to find out what engine we had. The yardmaster did not have the bills ready, but he told me what track the train was on.

Q. Did you check up that train?

A. Yes, sir.

Q. What did you do in checking it up?

A. Took the numbers off the cars and marked them on my book.

Q. How many cars did you have?

A. Forty.

Q. Did you do that work yourself?

A. Yes, sir.

Q. And were you busy from the time you were called until your train left?

85 A. Yes, sir.

Q. What was your condition at that time, Mr. Wilson, that is, between the time you were called and the time you left Cleveland, that night?

A. I was awful sleepy and tired.

Q. Was there anything there in the yard that night that called your attention to your condition?

A. Yes, sir.

Q. What was it?

A. When I was coming from the caboose down to the yard office, the head brakeman and I were walking along between the train I had in there and another one that they had brought in later, between the two tracks, and we were walking along there, and I stumbled and bumped into the side of a car in the train I brought in, and it woke me up. I had been dozing and walking along there.

Q. And after you left Cleveland did you do anything in connection with your train there?

A. Yes, sir.

Q. What did you do?

A. I had my book with the numbers of the cars on. The wheel report did not have any numbers on it. I was trying to copy the numbers off the book on to the wheel report, and when I would look down at the book to get the numbers, it looked as though there was two numbers. I couldn't get them. It was double. I had a meet order for an extra.

86 Q. What do you mean by a "meet" order?

A. A meet order to meet an extra train coming in the opposite direction, and I knew I didn't dare to sit there or I would go to sleep. I had to keep awake.

Q. Did you fill out your report?

A. No, sir, I couldn't finish it. I started to do so when I was marking the report down, and I couldn't keep awake, and I went out and rode on the rear platform of the caboose.

Q. Did you ride with any one?

A. Just myself.

Q. How far did you ride?

A. I rode from there to Peninsula on the back end of that caboose.

Q. Do you know what time it was when you reached Peninsula or anywhere near it?

A. About two o'clock I should judge. I didn't make any record of the time.

Q. Do you know how the tracks ran there, in what direction they ran?

A. The main track runs north and south at Peninsula.

Q. And the side track there?

A. The side track is east. side of the main track.

Q. East of the main track?

A. Yes, sir.

Q. When you ran into Peninsula. where did your caboose stand in regard to the north end of that side track?

A. It stood about ten or fifteen car lengths north of the side track.

Q. And then what did you do?

A. I got off the caboose and came over to the head end of the train. I noticed we had a hot box.

87 Q. Did you have any more than one hot box?

A. We had two. I fixed one up. It wasn't so hot.

Q. What did you do?

A. Put some oil on it and some new dope.

Q. Then what did you do?

A. I went over to the engine and I saw the engineer.

Q. By the way. where was the other hot box in your train, how far from the caboose?

A. It was about the middle of the train. The hot box, one of them was about eight car lengths from the caboose.

Q. And on which side was the one that was about eight car lengths from your caboose?

A. On the east side.

Q. Was that the one that you were going to set out?

A. Yes, sir.

Q. Then what did you do after you fixed up the other hot box?

A. I went over to the head and where the engineers were, they were taking water on the second engine at the time, and I told the engineer I had a hot box to set off.

Q. Told which engineer?

A. The engineer on the second engine, Engineer Miller.

Q. Then what did you do?

A. I went from there to the telegraph office, and I saw the operator, and he asked me if I was ready to go and I told him no, I had

88 a hot box to set off. He went inside, and I stayed outside, and I made out a hot box form for the car I was going to set off, and also gave him the bill for the car, and when I got through with that the engineers both came over, and the head brakeman came with them, Van Winkle, and the engineer—I don't remember which one, I think Miller—said, "How are you going to set the hot box off?" I said, "I am going to pull it up to the

clear with the second engine, cut off the train, and set it off from the rear end." I said, "I am going to get off at the hot box and cut the cars off there behind the hot box." Now, my brakeman was standing there, and I said, "You let them over the main track and stay at the caboose, and when I cut it off, you let the air in." This was a very bad grade there and we had to hold the cars from running.

Q. What did you do then?

A. We walked over to the engine, the head brakeman cut off the cars ahead of the second engine—there were five cars between the second and the head engine, and I cut the cars off behind the second engine.

Q. Before you did that had you moved the train to the south?

A. Yes, sir, we pulled it in the clear.

Q. So that the caboose was south of the switch at the north end?

A. Yes, sir.

Q. Then what did you do?

A. We took the second engine pulled up over the switch, the head brakeman threw the switch, I got on the running board on the west side, backed down on the siding along the train.

89 Q. On the running board. Where was that located on the train?

A. On the rear end of the tender.

Q. Was there any light at the rear end?

A. No, sir.

Q. Did you have any light with you?

A. I had a lantern.

Q. And where were you standing on that foot board as you were going north?

A. I was standing on the west end.

Q. Now, how fast—could you tell about how fast your engine was going as you were going north there?

A. It was not going over five or six miles an hour.

Q. Now, when you reached the hot box—or did you go as far north as the hot box along on your train?

A. Yes, sir.

Q. When you reached that about how fast were you going?

A. Just about an ordinary walk when we got to the hot box.

Q. Was the power on when you got to the hot box?

A. No, sir, it was shut off. We were drifting.

Q. How far south from where the hot box was had the engine been shut off?

A. Oh, five or six car lengths, somewhere like that.

Q. What was your condition—that is, when you were riding north on that running board?

A. I was awful sleepy and tired.

Q. Was there anything at that time that called your attention to your condition?

A. Yes, sir.

90 Q. What was it?

A. I could see the tail light on the rear end of the caboose.

It was green. From the direction I was looking at it, I looked at it and it looked like two lights, staggery-like, like two lights, and I knew there was only one. My eyes seemed blurred. I felt like I could lay right down on that footboard and go to sleep.

Q. Had you ever noticed before this time the distances between cars standing on parallel tracks, that is the distance between cars standing on main tracks and the siding next to main tracks, over the lines on which you had operated trains?

A. In Newcastle division?

Q. Yes.

A. Why, I never noticed any less——

Q. I asked you if you had ever noticed it? Have you ever noticed those distances?

A. I don't understand your question.

Q. That is, previous to the time of your injury, while you were operating trains, or connected with their operation, had you ever noticed the distance between the sides of cars standing on parallel tracks where the tracks were main tracks and sidings next to main tracks?

A. I always noticed that they were about four feet or more.

Q. Had you ever noticed them on any other division except the Newcastle division?

A. No, sir.

Q. What is the shortest distance between cars standing on
91 parallel tracks, for such tracks as I have mentioned, that is, main tracks and sidings next to main tracks, that you have ever noticed?

Mr. Sheean: I object to the question in the form it is put.

The Court: Objection sustained.

Mr. Ives:

Q. Well, what have you noticed in reference to those distances?

A. I have never noticed any less than three feet and a half.

Q. Do you know where there was any siding where the distance was three feet and a half between them?

A. I know the siding at Lowellville was very close.

Q. Had you ever run a train as conductor through Peninsula before this time?

A. One trip.

Q. When was that?

A. The 21st of July, 1913.

Q. And at that time did you notice anything about the tracks there, their distances apart?

A. No, sir.

Q. At the time of your injury or before the time of your injury did you know anything about the distances apart of the tracks there in Peninsula?

A. No, sir.

Q. Before you left Cleveland that night, did you have any talk with the person in charge of the yard there?

A. I had a talk with the yardmaster.

92 Q. Was he the man who gave you instructions as to what you should do that night?

A. Yes, sir.

Q. And what was your talk with him that night?

Mr. Sheean: I object, your Honor, to any conversations with the yardmaster as incompetent to bind the defendant. There is nothing in the declaration predicated upon any such statement.

(The following proceedings were out of the hearing of the Jury:)

The Court: What is the conversation you want to prove?

Mr. Ives: The conversation is, he asked the yardmaster for a pilot, that is, a man to take charge and show him the road, and the yardmaster said he did not have any man that he could send with him, and the purpose of it is to carry notice to the defendant of this man's ignorance.

The Court: You haven't any count in the declaration to cover that, have you?

Mr. Ives: Yes, there is the count of the failure to warn, that he was ignorant and the defendant was not ignorant, and that the defendant knew or ought to have known of his ignorance, and this shows that they knew of his ignorance because he specifically called his intention to it.

Mr. Sheean: You haven't a failure to warn count, though.

Mr. Ives: Yes, I have.

Mr. Sheean: Which one?

93 Mr. Ives: On the proximity of the tracks, and so forth.

Mr. Sheean: You do allege that the tracks were negligently close, and that he did not know they were.

Mr. Ives: And that they negligently failed to warn him. I allege every one of the essential elements necessary.

The Court: Get me the declaration.

Mr. Ives: The second count, your honor.

The Court: Here it is, at the top of page seven. What was the conversation you expect to prove?

Mr. Ives: That he told the yardmaster, who ever it was that he talked with there, that he needed a pilot, somebody to show him the road, and the yardmaster told him he didn't have any, he would have to go without it. He told him he was not familiar with that roal and needed a pilot. Now, that is material I think on the question that the plaintiff was ignorant of the dangerous closeness of the tracks there, and the defendant did know that the tracks were dangerously close together there.

Mr. Sheean: You are not charging us in this conversation with notice of that.

Mr. Ives: No, except notice of his ignorance.

Mr. Sheean: Well, we would be bound to know of course, as to what his familiarity with that was from the record of the

94 times he had run over there. His conclusion or his judgment as to whether he wanted aid or assistance is not competent.

Mr. Ives: Here is the allegation. (Reads from declaration.) He tells them he is ignorant generally of that road, and he is his superior there that night.

The Court: The question of a pilot hasn't anything to do with this.

Mr. Ives: No, not the question of a pilot, but the information that he conveyed to him, that he was ignorant of the condition of that road generally. That is the purpose of it, to show his ignorance.

The Court: Objection sustained.

(Proceedings resumed in the hearing of the Jury, as follows:)

Mr. Ives:

Q. Previous to your injury, in the operation of trains, did you always make a record with the defendant of trains that you took out, and where your destination was and make another record when you arrived?

A. Yes, sir.

Q. And that was true of all trains you ever handled, was it?

A. Yes, sir.

Q. As a brakeman had you ever been through Peninsula before the time of your injury?

A. Yes, sir.

95 Q. How long before.

A. 1910.

Q. You had not been there after the flood then, which was in March?

A. No, sir.

Q. Now, when you were standing on the west end of that running board and arrived at the place where the car was with the hot box, what did you do?

A. I got off the engine foot board, in between the engine and the cars of the train.

Q. And what happened after that?

A. I don't remember.

Q. Is that the last thing that you remember, stepping off the foot-board?

A. Yes, sir.

Q. And what is the next thing you remember?

A. I came to in the hospital at Akron.

Q. Do you remember when it was?

A. The following Tuesday.

Q. And what was your condition, so far as you could tell it, at that time?

A. I was suffering awful pain. I was just as sore as could be.

Q. Where was the pain?

A. All over me, in the back.

Q. Any one place more than another?

A. My back, awful pains in my back, and from there down; my right hand felt just like as if I was holding it down in a bucket of hot water.

Q. Was your arm off at that time?

A. I didn't look, but it was paining me awfully.
96 Q. You don't know whether it was off or not?
A. No, I was not conscious very long.
Q. Do you know of your own knowledge when your arm was taken off?
A. I didn't know at the time.
Q. What?
A. They told me it was taken off at that time.
Q. You don't know of your own knowledge?
A. I don't know.
Q. And your arm is off at the elbow, is it?
A. At the elbow joint.
Q. Before the time of this injury what was the condition of your health?
A. I was strong and healthy.
Q. Anything the matter with you at all?
A. No, sir.
Q. And do you know how long you were conscious there that next day?
A. No, I don't. I was not conscious very long.
Q. And when did you come to again?
A. The next day.
Q. And what do you remember about your condition then?
A. It was practically the same. It was hurting and paining. My back hurt me something awful.
Q. How long were you there in the hospital?
A. Twelve days.
Q. What treatment was given you there, if you know?
A. Well, they would dress my arm every two or three days, and every hour or so the nurse would come in and run a needle in my arm, which I found out later was a hypodermic.
97 Q. You didn't know what it was at the time?
A. No, sir.
Q. How long did she continue to do that?
A. Until just two or three days before I left.
Q. Did you notice anything the matter with your back before you left the hospital?
A. No.
Q. Other than the pain that you felt there?
A. Other than the pain. I didn't get any chance. I didn't know. I couldn't roll over.
Q. Did you afterwards find anything the matter with your back, that you observed other than feeling pain?
A. Yes, sir, I found out in a day or two after I went home.
Q. How did you find out, by your own knowledge?
A. By rolling over on my side. They put an air pad under me. I had two big sores on there, and they were going to put an air pad on and I ran my hand along my back and felt a big bump.
Q. Where was that bump with respect to the back bone?
A. Right on the backbone; it is the same way yet.

Q. That was the first you knew of anything the matter with your back?

A. That is the first I knew that the back was crooked; I knew it was giving me awful pains, but I didn't know what was wrong; I knew then it was crooked.

Q. Did you feel pain in any other places, other than you have indicated, while you were in the hospital?

98 A. I had awful pains in this right leg. If there would be just a wrinkle in the sheet under that leg it would pain me. I couldn't move a toe. I couldn't move a muscle in the leg. I could move this one a little bit.

Q. And did you feel pain any where else?

A. My rib, that rib (indicating). I found I had a broken rib. It was awful sore, and when they rolled me over it would hurt.

Q. Any other place?

A. This collar bone was broke for twelve days. They set it the twelfth day after it was hurt, or he told me it was set. He tried to set it at the time. It hung loose there from the shoulder. You could feel it move around.

Q. What is the condition of your right leg at the present time?

A. I haven't got any strength in it.

Q. Have you got any feeling in it?

A. No feeling along here, no feeling down along the shin.

Q. Where do you have feeling?

A. Under my knee, and along down here. My toes just feel like they were sound asleep all the time; they have got a stinging feeling.

Q. What is the condition of your right leg as respects flesh on it?

A. It is nothing but skin and bone.

Q. What is its condition in regard to your having any use of it or not?

A. I haven't the least use of it; there is no strength to it.

99 Q. What has been the condition of that leg since the accident in respect to whether it has been the same since the accident, or whether it has gradually grown better or worse?

A. This here one?

Q. Yes.

A. It is not getting any better. It is getting weaker, if anything. It is getting smaller.

Q. When did it commmence to grow smaller?

A. About two months after I was hurt.

Q. Has it improved for any period since you were hurt?

A. No, sir, it got weaker. This soreness has went out of it, but it hasn't got any response.

Q. What is the condition of your left leg?

A. It is weak. The sense of feeling is dull on top here, on top of the knee.

Q. What is its condition with respect to feeling any pain there?

A. It pains me some. It seems as though it is right in the bone. The pain seems as though it is in the bone.

Q. What is the condition of that left leg as respects using it?

A. This left one?

Q. Yes, the left leg?
A. It is weak, awful weak, but it is stronger than it was.
Q. Can you use it?
A. Somewhat better than this one. I can't get the full use of it.
Q. Can you walk?
A. I can walk around with crutches, but very little.
100 Q. What is the effect when you do walk around on crutches considerably.
A. It makes me so tired and sore that I won't be able to do anything, and won't be able to sit up the next day.
Q. What has been the condition of your bladder, that is, in regard to urine, whether you retain it or control it since the time of the injury?
A. I cannot control it.
Q. Has that improve- any?
A. It is getting better.
Q. When did it commence to get better?
A. Well, it has been gradually getting better right along. The doctors are helping it.
Q. And what has been the condition of your bowels?
A. They had been pretty bad, but they are getting a little better, too.
Q. After you got back to Newcastle, what treatment did you have?
A. Well, I had the doctor come to see my every day.
Q. For how long?
A. About a month.
Q. What doctor was he?
A. Dr. Foster.
Q. Did he do anything for you, operate in any way?
A. Yes, sir, he cut a little piece off my arm that grew out from the side, about an inch long, and half an inch thick.
Q. Has there ever been any operation on your back.
101 A. No, sir.
Q. When you got back to Newcastle, did you notice anything, the matter with your head in any way?
A. I noticed I had two large cuts on my head, one on the left side and one on the back part of the head, two deep cuts.
Q. How did you feel in your head after this accident?
A. I noticed going home in the train that day I was dizzy.
Q. How long did you continue to be dizzy?
A. I was dizzy for a day or two. Things seemed to go around when they were standing still.
Q. Have you experienced any trouble of that character since?
A. No, not lately.
Q. Have you experienced any difficulty since then in regard to your sexual power?
A. No power.
Q. You mean to say you have had none?
A. I have had no power since.
Q. Did any other doctor treat you in Newcastle except Doctor Foster?

A. Dr. Rogers.
Q. What kind of a doctor is he?
A. He is an osteopath.
Q. How long did he treat you?
A. He treated me for six weeks.
Q. Had any other doctor treated you?
A. I went to see Dr. Scott, but he wouldn't do anything for me.
Q. Have you had any other treatment? Have you had
102 any other doctor treat you since you have been in Chicago?
A. Yes, sir.
Q. Who?
A. Dr. Hall and Dr. Krohn.
Q. What is your condition at the present time as respects pain?
A. I have awful pain in my back, all up along both sides.
Q. How is that pain in respect to whether it is constant or not?
A. Constant pain right in here, and I have more or less pain in this leg all the time. It keeps me awake an awful lot at night, and in my foot.

103 Mr. Ives: Cross examine.

Cross-examination by Mr. Sheean:

Q. Mr. Wilson, during the time that you were employed as a brakeman, and subsequently as conductor, did you have a copy of the wage schedule between the train men and the railroad company?
A. No, I have not.
Q. You haven't any such copy now?
A. No, I haven't.
Q. But the entire matter of the rules under which trainmen operate and their rates of pay were governed by a schedule entered into by the company and the Brotherhood, is that true?

Mr. Ives: I object to that question, if your honor please.
Mr. Sheean: Well, if you object simply to the word "Brotherhood," I mean generally.
Mr. Ives: I object to it as incompetent.
Mr. Sheean: I will modify the question slightly.
Mr. Ives: Unless it bears on the amount of his earnings.
Mr. Sheean: No, it is not that.

Q. You knew, Mr. Wilson, that the entire operation, so far as the trainmen and the railroad was concerned, was governed by a schedule of general application, did you not?

Mr. Ives: Now that is objected to.
The Court: He may answer.
Mr. Ives: As immaterial and incompetent.
The Court: He may answer.
104 Mr. Sheean: Just read the question.

(Question read as follows: "Q. You know, Mr. Wilson, that the entire operation so far as the trainmen and the railroad was con-

cerned was governed by a schedule of general application, did you not?")

A. I did not, not altogether.

Mr. Sheean:

Q. Well, had you seen any copy of a schedule at any time while you worked there?

A. I had read one over but I did not have any. I had read one over at one time. I had read over part of it, not all.

Q. You had read over part of it, and in a general way you had knowledge both as to the rates of pay, the length of days' service, the mileage rate at which you were to be paid and how your time slips were to be made out, had you not?

A. The trainmaster told us that.

Q. What is it?

A. The trainmaster showed us how to make out all reports.

Q. And you never at any time made any reference to the schedule that had been—the agreement that had been entered into between the company and the men?

Mr. Ives: That is objected to, if the court please, as incompetent and irrelevant.

The Court: The main difficulty is that it assumes something.

Mr. Ives: And insofar as it has any relevancy to anything
105 else except rates of wages, it is incompetent. It could not affect any statutory obligation.

Mr. Sheean: I don't claim that it did modify or suspend any statute in any way.

The Court: You may ask another question on the same line, if you like.

Mr. Sheean:

Q. The matter of the calling of the men was regulated by rule, was it not?

A. Why, they would have two hours after the call.

Q. At what point or points?

A. Before you were to leave.

Q. What is it?

A. Before you were to leave.

Q. Was that uniform at all places, or was the calling arrangement made to fit local conditions at different points?

A. I think it was uniform. I think they always—as far as they ever called me, I always had about two hours.

Q. Your home terminal at all times was Newcastle, was it?

A. Yes, sir.

Q. Or Newcastle Junction?

A. Newcastle.

Q. And that was the only place at which you were called?

A. I would be called when I was in Cleveland.

Q. And were you called at Cleveland two hours before leaving time?

A. Yes, sir, two hours before I was to leave.

106 Q. Before you were to leave, yes. Now, your time that you kept and of which you have record, was from the time that you reported at the roundhouse, was it?

A. Do you mean in the book?

Q. Yes.

A. No, it was kept from the time that I was to report, that they required me to report. They would tell me at the time I was called what time I was called to leave.

Q. What time you were called to leave?

A. That is all.

Q. And the record that you made was of the time you were to leave?

A. The time I was called to leave.

Q. Called to leave?

A. Yes, sir.

Q. Now, how much before the actual departure of the train was that, or was there any fixed arbitrary on that?

A. You were called two hours before you were due to leave.

Q. And that was to leave from Newcastle Junction?

A. Any place where we were.

Q. Well, I mean, where you ordinarily left?

A. Oh, yes.

Q. And you, after being called at your home at Newcastle, would take a train down to Newcastle Junction, and the time that you were advised that you would be expected to leave was about two hours before you went on duty, or before you took your train, I will put it that way,—I don't want to quibble about going on duty, Mr. Wilson.

107 A. Well, it would be two hours before we were called to leave, the time that we was called to leave.

Q. Yes, the time you were called to leave. Sometimes you would not go out for an hour or two after that time?

A. No, sometimes.

Q. But your pay would go on from the time that you were called to leave?

A. Yes, sir.

Q. Now, you have an accurate record, have you not, of the time you were called to leave on all these trips that you have been describing here?

A. Yes, sir.

Q. And on this first trip that you told us about, on the 19th, the time that you were called to leave was 4:15 P. M., was it not?

A. I was called at 2:15 P. M. to leave at 4:15.

Q. Yes, called to leave at 4:15 P. M.?

A. Yes, sir.

Q. And the time that you were relieved from that run, was 2:45 the next morning?

A. The time I got in the yard was 2:45.

Q. Well, what part of the yard?

A. In the—get the train in clear off the main track, you get in the yard.

Q. And relieved of any further responsibility as to that train?

A. Except making out my reports and registering, and all that.

Q. I say as to the train?

108 A. I was clear of the train, I had nothing more to do with the train. The only thing I had to do was to register.

Q. Yes, and the time that you reported, at 2:45, was when your responsibility for that train ended?

A. My work was not done.

Q. What is it?

A. My work was not done.

Q. I asked, your responsibility for that train?

A. The train did not need any responsibility, it was in the clear, just off the main track, it was in the yard.

Q. In the yard?

A. Yes, sir.

Q. And off the main track?

A. Yes, sir.

Q. Now you turned in at that time one day's work for that time between 4:15 in the afternoon and 2:45 the following morning, did you not?

A. Yes, sir.

Q. And were paid for a full day's time?

A. Yes, sir.

Q. Then you took out another train, started out again that same morning at 3:30?

A. I was called to leave at 3:30, but the train did not leave until 4 o'clock.

Q. Yes, but your time under pay began at 3:30?

A. That is the time I made it, yes, in the time slip.

Q. And that run you completed at 10:55?

A. A. M., yes, sir.

Q. A. M., the next morning, on the 20th?

A. I arrived at Newcastle at that time.

Q. You received another day's pay for that?

A. Yes, sir.

Q. Did you not?

A. Yes, sir.

109 Q. So that from 4:15 on the afternoon of the 19th until noon the next day, you received two full days' pay?

A. Yes, sir.

Q. Now, were you in the pool service at that time?

A. No, sir.

Q. Did you have a regularly assigned run?

A. No, sir.

Q. You were in the irregular freight service?

A. I was extra, irregular extra.

Q. There was an extra board at Newcastle?

A. Well, there was a few extra men there, they did not exactly have an extra board. They just had a few extra men.

Q. How many extra men?
A. Oh, three or four.
Q. What is it?
A. Three or four.
Q. Three or four extra conductors?
A. Yes, sir.
Q. And did those extra men run first in and first out?
A. Well, you was always first out when you came in. I never — in with three or four there. I don't know. I expect they would, though, if they was to get congested in there.
Q. Then you simply ran in turn, is what I mean by the pool there?
A. That is the way the pools run.
Q. Well, your extra board or the extra crews of three or four men at Newcastle Junction——

Mr. Ives: I object to any cross examination on this line
110 as irrelevant and incompetent.
The Court: He may answer.
Mr. Ives: Exception.

Mr. Sheean (continuing): —they ran in that way so far as your observation went there, Mr. Wilson?
A. I presume they did. We did not have an extra list. There was just—these fellows all had a regular job of braking, and when they needed them they would take them.
Q. Yes, and they were on the extra list of conductors?
A. As far as being assigned to a regular list there was none, they had none. We were liable to be called for brakemen the next day, we could not tell.
Q. Now, when you got in from your run there, was any notation of any sort made on the board as to what time you got in?
A. I registered.
Q. Registered. And what was put on this register besides the time that you arrived?
A. The names of the crew.
Q. Anything else?
A. The time that I had been on duty the trip before this one.
Q. Yes?
A. The time I arrived and the time I left.
Q. A total length of time on duty?
A. Yes, sir, for both days.
Q. In case you wanted any layoff or any extra rest, where was that request noted?
A. It would not be noted.
Q. How would it be made?
A. We would have to go to the trainmaster and ask him.
111 Q. At the time of the arrival of your run?
A. Any time.
Q. At any time?
A. Any time.
Q. At the completion of your run, and where you registered, had

you ever observed upon this register any request or notation as to length of time the party desired for rest?

A. I did.

Q. About how frequently?

A. Every time I thought there would be a chance of getting it.

Q. Yes. And about how often was that, that you saw this on the register?

A. I would make it myself.

Q. You would make it yourself?

A. I would mark for ten hours' rest, but it would not do any good, they would call you right away.

Q. Now, how often have you marked for the ten hours' rest?

A. Well, I could not say how often, but I have done it frequently.

Q. So that it was the practice there that when any person desired any ten hours' rest, that at the end of his trip he made that notation at the time that he registered?

A. No, it was not the practice. We as a rule—we never could tell how long we would be in.

Q. No, but where you desired the ten hours' rest, the place for making that notation was on the register?

A. It did not do any good.

112 Q. Well, that is not the question, Mr. Wilson, that I was asking you. I am simply asking as to where you made a notation of it when you did desire it. Or I will put it the other way: Where was the place that you noted it at the time that you made the notation of desiring ten hours' rest?

A. I told the caller, the call boy.

Q. Well, did you make any notation of it anywhere?

A. No, it was not necessary. I just told the call boy that I wanted ten hours' rest.

Q. But you never made any notation of it on the register?

A. I made it once.

Q. Once?

A. But it was a good while ago, and I hadn't more than got to the house until I was called, and I never made it again.

Q. Never made it again?

A. No, sir.

Q. Now, how many times did you notice a notation of that sort made by any one else at the completion of his run?

A. Well, I haven't noticed very many.

Q. Now, was there any board kept there at Newcastle Junction where you marked up, in addition to the register?

A. No, sir.

Q. At the time of your arrival?

A. No, sir.

Q. Or the length of time on service?

A. No, sir.

Q. Or anything of that sort?

A. Nothing but the two register books.

113 Q. The two register books. Now were these books duplicates, the one of the other?

A. One was the Interstate Commerce book, and the other was the Baltimore & Ohio book.

Q. And you had made the same entries in the two?

A. Yes, sir.

Q. And Interstate Commerce book was the hours of service, a book showing the length of time that you were on service?

A. Yes. sir.

Q. When relieved?

A. Yes, sir.

Q. And you made the same entries in both of them?

A. Well, the B. & O. book would be more for to show what you handled, the cars you handled and the time you arrived.

Q. And in addition to that the same information was put into the Interstate Commerce book, as to length of time on duty?

A. Both trips, that one and the one previous to that.

Q. Now, on these trips that you made out from Newcastle that you have described here upon direct, going out on No. 13 or on the express train, where did you ride upon that train?

A. The first trip I went out I rode in the mail car, sitting on a bundle of mail, a mail sack.

Q. And how far out had you gone when you knew the point at which you would relieve an incoming crew?

A. We were notified about Hazleton, the conductor told
114 us coming into Youngstown that we was to get off at Ohio Junction.

A. And about how far was that from your starting point?

A. From Newcastle?

Q. Yes.

A. About 16 miles.

Q. Sixteen miles?

A. Yes, sir.

Q And how far from Ohio Junction, about?

A. About eight.

Q. Now, you knew, did you not, that a crew which was to be relieved because of running close to the 16 hours on duty, was not relieved until after the expiration of 14 hours, that is, they were entitled to 14 hours' pay if some one else took their train away from them?

A. I don't know. I don't know what they got.

Q. Well, you have been relieved yourself, have you not, and you had your time slips when your train was taken from you by another crew?

A. Not sort of fourteen hours.

Q. What is it?

A. Not short of 14 hours.

Q. That is what I say, not short of 14 hours.

A. Yes, sir.

Q. Wasn't it a part of the agreement that you were entitled to 14 hours, that you would not be relieved short of that 14 hours?

A. I don't know whether it was or not.

Q. You don't know as to that?

A. I don't know.

Q. You were, Mr. Wilson, were you not, during all of this
115 time a member of the Brotherhood of Railroad Trainmen?

Mr. Ives: That is objected to, if the court please, as incompetent and immaterial.

The Court: He may answer.

Mr. Ives: Exception.

Mr. Sheean:

Q. You were, weren't you, Mr. Wilson?

A. Of the Brotherhood?

Q. Yes?

A. Yes, sir.

Q. During all of the time that you operated as a conductor there at least?

A. Yes, sir.

Q. And whatever contract or arrangement the Brotherhood entered into on behalf of the trainmen was a contract on behalf of you?

A. They never consulted us. They would go right on and do what they wanted to.

Q. But you were a member of the organization during all the time you were a conductor?

A. I was a member of the Brotherhood, yes, sir.

Q. Now, on this first trip that you made out, you rode on the express train?

A. Yes, sir.

Q. And the total mileage that you made on that trip was how much, before you got back to Newcastle?

A. About 50 miles.

Q. What is it?

A. About 50 miles, I should judge.

Q. You were paid for a hundred miles, and part of that was dead-heading, you dead-headed one way, rode on the express train one way?

116 A. Yes, sir.

Q. Now, while you were upon the express train you had no responsibility as to how that express train moved, where it stopped or what it did?

A. No, sir.

Q. Nothing whatever to do with that?

A. Nothing to do with the express train.

Q. You were simply riding on that train to get out to relieve another crew at some point where you were told to, and bring that train east?

A. Yes.

Q. So that for the hundred miles that you were paid there, you had charge of a train one way, namely, from Ohio Junction back to Newcastle?

A. Yes, sir.

Q. About 25 miles?
A. I had charge of a freight train.
Q. Charge of a freight train?
A. Yes, sir.
Q. Well, that was the only train that you had anything to do with the actual operation of that day?
A. Yes, sir.
Q. For that 25 miles you were paid for 100 miles run?
A. About 50 miles.
Q. What is it?
A. I made about 50 miles.
Q. Well, counting the time that you rode on the express train?
A. Yes. About 25 miles, if you don't count that.
Q. Then it was practically a repetition of that trip that you made, the second trip out, was it, beginning——

117 A. Four o'clock.

Q. 3:30 A. M., that same—the next morning?
A. Yes, we went out on 97.
Q. What is 97?
A. A fast freight.
Q. And where did you ride there?
A. Rode in the caboose.
Q. In the caboose on the fast freight. You had no responsibility whatever with reference to the movement of that train?
A. No. sir.
Q. Where it stopped or what work it did?
A. Nothing to do with it.
Q. And you went to Ohio Junction on that train, did you?
A. Yes, sir.
Q. Then at Ohio Junction you gor a freight train and took charge of it?
A. Yes, sir.
Q. Now, the men who were on that train up to the time that you relieved them, they rode in or dead-headed, as the trainmen call it, back to Newcastle, did they?
A. Part way with me.
Q. Part way with you. But they had no responsibility as to that train from the time that you took charge of it?
A. They had nothing to do with the train. I was in charge of it.
Q. Yes. Now, for that trip of 25 miles you were paid for one day?
A. Yes.

Q. At the completion of those trips at 10:55 on the morn-
118 ing of the 20th was there any notation or request made, any notation made on the register or any request made to anyone, as to the length of time that you desired before being called again?
A. I told—I went over to see the trainmaster.
Q. What was his name?
A. His name was Mr. Yohe.
Q. How do you spell it?

A. Y-o-h-e, I believe.
Q. Yohe, yes. Did you see him?
A. Yes, sir, and I wanted to get off, I had been trying to get off for a week or more.
Q. What did you say to him?
A. I asked him if I could be off, and he told me no, to make a few more trips, he had nobody to work, I would have to remain on duty, which I did.
Q. To remain on duty?
A. That is, to remain——
Q. What was your request at that time? Just what did you say to him?
A. I asked him if I could not be off.
Q. Be off for what length of time?
A. For a length of time, I did not state any definite time.
Q. To take a lay-off?
A. Yes, to rest, rest up, I wanted off a few days or a week. I didn't make no definite time, I didn't know.
Q. Well, can you tell us just what your language was?
A. That is just what I asked him, if I could be off.
119 Q. If you could be off?
A. Yes, sir, for a few trips, something like that. I just asked him if I could be off for a few trips. I had asked him before then, and he told me that he could not let me off then, to ask him another time, to come around some other time.
Q. That was for a lay-off of several days, you say, that you talked with him?
A. A few trips, I don't know.
Q. A few trips?
A. Yes, I said a few trips.
Q. That was on the morning or at noon on the 20th, was it?
A. It was after I come in.
Q. What it is?
A. It was after I come in on that trip.
Q. After you came in on the second trip there?
A. Yes, sir.
Q. From Ohio Junction. Now was that the only request that you made at that time as to a lay-off?
A. That is the only time I asked him that day. I had asked him before that.
Q. Well, any time between that time and the time that you were hurt?
A. Well, he told me to make a few more trips and then come and see him, so I was going to do what he told me.
Q. Well, what I am getting at, Mr. Wilson is that you did not see him again between this time and the time you were hurt with reference to any lay-off?
A. No.
120 Q. Had no talk with him of any sort?
A. No.

Q. You made no notation on the register as to any particular length of time of rest that you wanted?
A. No, sir, not that I remember of.
Q. On the afternoon of the 20th you went out at 5:10, I believe, or you said about 5:15?
A. About 5:15.
Q. You were called to report—or called to leave at 4:15 that afternoon?
A. Yes, sir.
Q. Now, that trip you made to relieve a crew, was it, did you dead-head out on that? I have forgotten?
A. I dead-headed to Akron Junction.
Q. How far is that?
A. Seventy-two mile-.
Q. And on what kind of a train did you go out?
A. A mail train.
Q. That is the same train that you went out on before?
A. Yes, sir.
Q. And on that trip you had no responsibility as to the movement of that train?
A. No, sir, not the express train.
Q. What time did you arrive at Newcastle—I mean at Akron Junction?
A. 7:35.
Q. 7:35?
A. P. M., yes, sir.
Q. And what time did you relieve the crew that you found there?
A. 7:35. I took charge as soon as I got there.
121 Q. Now, from the time you took charge, the crew that you relieved had no responsibility for that train?
A. There was no crew there. There was nobody there when we got there.
Q. Nobody there?
A. No, sir.
Q. The crew you found—or the train you found waiting for you was——
A. —deserted.
Q. Where the crew had gone you don't know?
A. No, I do not.
Q. That train you brought back or brought to Newcastle, did you?
A. Why, I left part of it at Ohio Junction and the rest at Hazleton, and run to Newcastle Junction light.
Q. Getting to Newcastle the next morning at 9:10, I believe you said?
A. Yes, sir.
Q. Now, upon reaching Newcastle at 9 or 9:10 the next morning, do you remember just what you had to do with reference to that train after it reached the yards, after 9:10, I will say?
A. Well, I had to go to the—I went to the roundhouse.
Q. For the purpose of registering?
A. Yes, sir.

Q. Registered in the two books?

A. Yes, sir. One is at the roundhouse and the other is at the telegraph office.

Q. And what else did you do?

122 *Q.* I got that time slip there signed by the call boy and I mailed it to the timekeeper, and then I went to the yard office and I left the wheel report for the train which I brought in, I had no train except the caboose, and then I went over to the office, and I mailed that time slip to the timekeeper.

Q. That is, in the railroad mail?

A. Yes, sir.

Q. Yes?

A. And I went to the telegraph office and I registered on the B. & O. book, and I had a tonnage report and a delay report.

Q. What is it?

A. A tonnage report and a delay report.

Q. About what is the size of the tonnage report, how much work is there to do on that?

A. The tonnage report is about the size of this sheet.

Q. And about how many entries did you have to make on it?

A. A tonnage report, you have to make all of the entries where you pick up and set off cars.

Q. How many had you made there?

A. Akron, Ravenna, Hazleton and Ohio Junction.

Q. There were four entries to make?

A. Yes, sir.

Q. Now, after that work was done there, then you were called to report, or called to leave at 5:30 that evening?

A. I have got a notation on this book, 5 o'clock.

Q. But the notation that you have on your——

123 A. —time——

Q. —time book is 5:30, is it not?

A. Is 5:30, and this is 5. I don't know which one is right.

Q. But your time slip was made out from your time book, was it?

A. I don't know. I as a rule make them off of this book (indicating). I always mark that (indicating) when I am to the call boy's office.

Q. This paper that I hand you, is that the time slip that you made out for that trip (handing paper to witness)?

A. That is it.

Q. And that also has 5:30 as the time, and your time book has 5:30?

A. The time book has 5:30, the one I keep in my pocket.

Q. And also the time slip?

A. Yes, sir.

Q. By referring to this original time slip, you find that that was made out as 5:30?

A. Yes, and I got this book 5 o'clock; I don't know how that happened.

Q. Now, from the time between 5:30 and 6:30, when the train left the terminal, what did you have to do?

A. I had to go—I went over to find out what the delay of the engine was, the engine was not out. The delay, the most of it, was on the engine not being out.

Q. Yes?

A. And I went over to find out what that delay was. I came back to the yard office and I copied the number of the cars off of
124 the wheel report or the bills off this book, this train book we are required to keep for reference.

Q. Then after leaving at 5:30 you proceeded as far as Warwick, did you?

A. I went to Cleveland.

Q. Well, before you were relieved, how far did you go?

A. I was relieved at Warwick.

Q. How far was that?

A. Warwick is about 88 miles.

Q. About 88 miles. And you reached there I think you said something like 6 o'clock the next morning?

A. 6:05.

Q. 6:05. So that from 6:30 in the evening until 6 o'clock the next morning you had charge of that train as conductor?

A. I was on the road.

Q. Or on the road, and you were the conductor of that train?

A. Yes, sir.

Q. Now, did you advise—make any request for relief?

A. No, sir.

Q. Where did you get word that you would be relieved?

A. At Warwick.

Q. When you reached Warwick, that came by message, did it?

A. No, not while I reached Warwick. When I got ready to leave Warwick I was told over the telephone.

Q. And about when were you ready to leave Warwick?
125 A. I don't—about 8 o'clock I think.

Q. Anout 8 o'clock. Between 6:05 and 8 what had you been doing at work?

A. I had ten cars to set off there, I was trying to set those off. We had to take coal at the coal chute, and we had to cross over on the other side to get to it, and there was a train over that way and we could not get over.

Q. So that you were waiting to get a clear track on which to do this, from 6 until 8?

A. Well, we set the cars off and we went down there to get coal.

Q. You did not succeed in setting them off, did you?

A. Oh, yes.

Q. Between 6 and 8?

A. Yes, sir.

Q. What did the crew do between 8:40 and 10, then, next morning after they took charge?

A. Who?

Q. I thought the other crew did some setting out there the next morning at Warwick?

A. No, sir; no, sir, I done it all.

Q. Well, you were kept busy then from 6 until 8, were you?
A. Yes, sir.
Q. Or were you waiting part of the time to get the track there?
A. I was making an effort to get the work done.
Q. And at 8 o'clock you were advised that you would be
126 relieved?
A. I was advised that there was relief coming on No. 12, that was the number of the train they were coming on.
Q. Yes, and that they would relieve you at Warwick?
A. Well, he did not say they would relieve me at Warwick. He just said there was relief coming on No. 12 for me.
Q. You got no orders to leave Warwick or you could leave Warwick——
A. Without orders.
Q. —without orders. At about 8:40 No. 12 passed by you there?
A. Yes, sir.
Q. Now, at the time that No. 12 passed by you there, was your train doing anything or was it simply standing on the siding?
A. Standing.
Q. All of the work at Warwick had been done and it was ready to proceed, was it?
A. We were ready to go.
Q. Ready to go?
A. Yes, sir.
Q. Then from 8:40 until the other crew took charge you had nothing to do about that train, did you?
A. I staid there.
Q. Just staid there until the other crew came?
A. Arrived, yes, sir.
Q. Now, from that time on until 5:10 that evening you simply rode on that train without any responsibility as to what happened or how the train was handled in any way, there was another conductor in charge of the train, was there?
A. Yes, sir.
127 Q. Three of the members of your crew you say occupied bunks or berths in that going down?
A. Yes, sir.
Q. On that caboose, from there down to——
A. Cleveland.
Q. Cleveland. And was that the same caboose that you had taken out of Newcastle with you when the trip started?
A. Yes, sir.
Q. And had you used that caboose at any other time.
A. No, sir.
Q. But you had started out with it at 6:30 the night before?
A. Yes, sir.
Q. From——
A. Newcastle Junction.
Q. Newcastle. Before going out upon that trip had you gone over the caboose?
A. No, sir.

Q. Made no inspection of it at all?
A. No, sir.
Q. You had not advised anyone that one of the bunks was out of order?
A. No, sir.
Q. Never at any time?
A. No, sir.
Q. Either before or after. When did you first discover that one of these bunks was not usable, in condition to be used?
A. Well, I just don't know where I discovered it. We found it out, though, before we got to Warwick.
Q. Before you got to Warwick?
A. Or about the time we got there. I don't know just when.

Q. Now, I understood you to say that — when you rode
128 out on the rear platform did you say?

A. Yes, sir.
Q. Was there a platform on the caboose?
A. Yes, sir, there is a platform each end.
Q. At each end?
A. Yes, sir.
Q. Then when you spoke of it being a box car, it was a converted box car, one that had been converted into a caboose, was it?
A. That is what it was. It was an old box car made into a caboose.
Q. With a door both front and rear?
A. Yes, sir.
Q. And platform front and rear?
A. Yes, sir.
Q. Handholds, steps——
A. Yes, sir.
Q. —front and rear. And where were these bunks, or berths that you speak of?
A. They were one in each corner.
Q. One in each corner. Now when you got to Cleveland at about 5 o'clock or a little after, that evening, you had nothing to do there with reference to registering as to that train, had you?
A. I had not registered.
Q. That train, wasn't that in charge of the other conductor?
A. I had to register on the Interstate book.
Q. What is it?
A. I had to register on the Interstate book.
Q. Well, simply on the——
A. Interstate.
Q. Showing the length of time that you had been upon duty?

A. That I had been upon duty.

129 Q. But you had nothing to do as to the making out of any wheel reports or tonnage reports, or anything else, simply to register in accordance with the law?

A. I registered with the law, and then there was a big blackboard, I marked the crew up on that, the names.
Q. You marked up the crew, you say?

A. Yes, sir.
Q. And did you on that blackboard make any notation as to the time of rest required?
A. No, sir.
Q. Or requested?
A. No, sir.
Q. No notation as to that at all, but simply the time that the crew had arrived and the length of time that they had been upon duty?
A. I didn't make no notations upon the blackboard, I just put down the names of the crew and our caboose number, that is all.
Q. The names of the crew and the caboose number?
A. Yes, sir.
Q. You put that down at the bottom of this list, did you?
A. Put that on the blackboard.
Q. On the blackboard list, on the board?
A. Yes, sir.
Q. And there were other names ahead of you?
A. There was nobody.
Q. Nobody?
A. No.
Q. You were at the top and bottom of that?
A. I was the only one.
130 Q. The only one there. Then that was all that you had to do there at that terminal, was it?
A. Well, I had to get the time slip signed by the yardmaster.
Q. The time of your arrival there?
A. Yes, sir, yes, sir, so he would—had to have his signature to it.
Q. O. K.ing the time of your arrival as being correct there?
A. Yes, sir.
Q. Then you had nothing to do with where your caboose was put?
A. No, sir.
Q. Or anything at all to do with the putting of that train off of the main track or on the siding or anything else?
A. No, sir.
Q. Now, you observed, I believe you said, that after you were called that night and on your way down, before you took charge of the train, that you stumbled or bumped against some other cars on the way down?
A. I bumped up against the car, run into the side of the cars.
Q. That was on your way down to the roundhouse?
A. That was on my way down to the yard office.
Q. To the yard office. And that was the time that you noticed that you were sleepy also?
A. Yes, sir.
Q. That was before you had registered out or taken any train at all?
A. That was after I was called. That was while I was going down.
131 Q. After you were called and on your way down to the yard office?

A. Yes, sir.
Q. Who did you see at the yard office when you got down there?
A. I saw the yardmaster.
Q. Saw the yardmaster?
A. And the clerk.
Q. And the clerk. Did you say to either of them anything about the fact that you were sleepy?
A. No, sir.
Q. Did you say to either of them that you had found yourself staggering and bumping against cars on the way down?
A. No, sir.
Q. Did you intimate to either of them that you thought you were not in a fit condition to take care of a train?
A. I asked the yardmaster for a pilot, that was all.
Q. For a pilot?
A. Yes, sir.
Q. You told him nothing about feeling tired nor sleepy?
A. I did not.
Q. Told him nothing about having stumbled even?
A. No, sir.
Q. Now, on your way out of Cleveland that night did anything at all occur before the arrival at Peninsula that was out of the usual course of operation at all?
A. To me?
Q. Yes, except you have spoken of feeling tired and sleepy all the time,—I think you have.
132 A. Well, when I was——
Q. What I mean by the operation of your train, nothing occurred except these two hot boxes you have spoken of, I believe.
A. That is all.
Q. And how long before you got to Peninsula was it you discovered those?
A. I discovered those after we left Vaughan, about four or five mile- from there.
Q. Four or five miles from Peninsula?
A. From Peninsula.
Q. Did you stop at Vaughan?
A. We barely stopped, just stopped and then started.
Q. Just slowed down, practically?
A. The fellow we was to meet there was pulling in as we arrived.
Q. You had a meet order there, had you?
A. Yes.
Q. And then you were to go as far as Peninsula for orders?
A. I had orders right through to Akron.
Q. What is it?
A. I had orders right through to Akron.
Q. Right through to Akron?
A. Yes, sir.
Q. And you were going right through without any stop except the meet order?
A. Well, we had to have water at Peninsula.

Q. At Peninsula. Now, when you stopped at Peninsula for water, that as I understand you, brought your caboose down or
133 north some 15 car lengths beyond the north end of that siding, the switch into the siding?

A. The caboose?

Q. Yes.

A. We just brought the caboose along there to clear, we did not pull it far by.

Q. I mean when you first stopped for water, on the first engine, it did not clear down there, did it?

A. Oh, no.

Q. Some—I think you said—about 15 car lengths, as I caught it, north of the——

A. Something like that, I don't know just what.

Q. Then after the first engine took water, the second one pulled up for water also?

A. Yes, sir.

Q. Then you cut off the first engine and the five cars that were back of it, or rather, I think you said the head man did that?

A. He cut off the head end and I cut off the hind end.

Q. That is, he cut off the first five cars?

A. There hadn't No. 2 taken water yet when I got up there.

Q. At the time that you had this talk as to how you were going to do the cutting off of this hot box, just who were present?

A. The engineers, both the engineers, engineer Miller and engineer Briggs, brakeman Van Winkle and I.

Q. And that was at the telegraph office there?

A. Yes, sir.

Q. Was that before the forward engine and the five cars had been cut off?

134 A. Yes, sir.

Q. And before any movement had taken place at all?

A. Except taking water, that was all.

Q. Except taking water on the forward engine, I suppose?

A. That is all.

Q. Now, when the second engine was cut off from the cut of cars, who rode on the engine besides you, if any one, as it went north along this siding?

A. Nobody except me.

Q. Where was Van Winkle?

A. He was on the head end. He cut the cars off ahead of the engine. I cut them off behind the engine.

Q. Did he ride up that forward cut, that cut of five cars, or was not his work done entirely when that cutting was done?

A. Well, no, where he made the cut was right by the switch or near to it, it was just a car length from the switch, and he went to the switch and threw it after we went over with the engine.

Q. Well, are you sure that Van Winkle did not ride down on this engine with you?

A. Where the hot box was?
Q. Yes.
A. Yes, sir, he did.
Q. He rode down there with you?
A. Yes, sir.
Q. And you were on the engineer's side, were you not?
A. Yes, sir.
Q. That would be the side nearest this cut of cars?

135 (Duplicate of page 134.)

136 A. Yes, sir, the side nearest to the train.
Q. Well, this train had forty cars in it, five had been cut off, and now that would leave 35 cars standing there?
A. Yes, sir.
Q. And they were all ore cars, were they?
A. Yes, sir.
Q. Just describe to the jury what these ore cars are like?
A. They are hopper—what they call a hopper, they are made out of steel and they don't haul anything in them but coal and wood—wood, coal, and then iron for the furnaces.
Q. What we ordinarily see here in this section as coal cars, gondolas, aren't they, the big gondolas?
A. No, the high ones with the box sloping down.
Q. Were all the cars in your train of that character?
A. All of them of that kind.
Q. Now, as you backed down there you were on the side of the engine nearest this standing train of cars?
A. Yes, sir.
Q. And about how near the rear of that train was the place where this hot box was?
A. About 8 car lengths.
Q. So that you went by about 27 of these cars alongside of you before the time you stepped off?
A. Yes, sir.
Q. Which side of the train was this hot box on, the side
137 toward the siding or the side away from the siding?
A. The side toward the siding.
Q. That is——
A. The east side.
Q. The east side. You are quite sure of that?
A. I am pretty sure it was on the east side.
Q. That was on the inside of the curve?
A. Yes, sir.
Q. On the inside of the curve?
A. That was on the side next to the siding.
Q. The side next to the siding?
A. Yes, sir.
Q. That would be the outside of the curve, then, wouldn't it?
A. The side next to the siding.

Q. And was the hot box that you had doped there on the same side of the train or on the opposite side?

A. It was on the opposite side.

Q. Now, from the time you got upon this footboard until you stopped off, did you give any signal with your lantern as to the speed or change of speed——

A. No, sir.

Q. —at which the engine operated down there?

A. No, sir.

Q. Gave no signal to the engineer?

A. No, sir.

Q. From the time you started until after the accident?

A. No, sir.

Q. Do you remember on which hand or arm you carried your lantern as you rode north along this siding?

138 A. No, I do not.

Q. The footboard did not run clear across the engine, did it? It was rather two footboards going as far as the drawbars?

A. Yes, sir.

Q. A footboard on each side of the drawbar?

A. Yes, sir.

Q. Your engine was going backwards and you were on the left side of that engine in the direction it was moving?

A. Yes, I was on the side next to the train, the left side.

Q. The side next to the train and the side on which the engineer was?

A. Yes, sir.

Q. There was a hand hold ran across this tank there?

A. Yes, sir.

Q. And you can't recall whether your lantern was out nearest the train——

A. I could not say.

Q. Or on the inside of it?

A. No.

Q. You don't recall whether or not you put your lantern out on the side toward the train or the side toward the ground before you stepped off?

A. I don't recall it.

Q. Have no recollection about that. But you are sure that you gave no signal of any kind——

A. Yes, sir.

Q. —to the engineer, no "slow" signal?

A. No, sir.

139 Q. No "Stop" signal? No signal of any kind?

A. No, sir.

Q. Now, in the uncoupling of that train or taking out of the hot box, it was your plan to pull the caboose and the eight cars south, back from the train over on to the storage track?

A. Yes, sir.

Q. Which was on the other side of the track you were running on?

A. Yes, sir.

Q. That is, the train was on one side of you, and the track you were running on would be the track between the place where the car then was and the track where you expected to place it?

A. Yes, sir.

Q. In the making of a switching movement, on which side are the signals given, to the engineer or to the fireman?

A. Either side.

Q. Ordinarily which way is it done?

A. Well, whichever it would be a little more convenient. If it is just as convenient, it would be just as well whatever side you do it.

Q. Now the place where you stepped off or got off of this engine would put you on the foreman's side of the engine if and when the engine had gotten down and couple on to the rear end of that train, wouldn't it?

A. I was on the engineer's side.

Q. Yes, at the time you got off. But if that engine ran
140 through that track and out onto the main track, if the engine stood upon the main track and was pulling the caboose there, you would then be on the fireman's side of the engine, wouldn't you?

A. Yes, sir.

Q. Were both Van Winkle and both engineers and the fireman in a position to hear all that you said as to how you were going to make that cut?

A. The fireman was not there, just the engineer, Van Winkle and myself.

Q. The two engineers, Van Winkle and yourself?

A. Yes, sir.

Q. But they were all in a position to have heard anything that you said about how you were going to make the cut?

A. Yes, sir, they asked me.

Q. How you were going to make it?

A. Yes, sir.

Q. Which one asked you as to how you were going to make it?

A. Miller.

Q. Miller?

A. I think it was Miller. He was ahead.

Q. Well, he was the engineer of the engine which went down there?

A. Yes, sir.

Q. You hadn't said—or had you said anything, rather, to Mr. Miller, or to the other engineer, as to feeling sleepy or tired at the time you were talking of riding this footboard down to make the cut?

A. I don't remember?

141 Q. Well, you don't remember ever having any talk with them about you——

A. No, I had a talk with them about the pilot, but I had no talk with them about that.

Q. Both of those engineers were Cleveland division engineers, were they not?

A. Yes, sir.

Q. Where was Van Winkle, if you remember, at the time that you said, "I am going to get off at the hot box"?

A. When I told him that he was standing right there beside me.

Q. And both Briggs and Miller were standing alongside of you at the same time?

A. Yes, sir.

Q. Was this hot box blazing at the time?

A. No.

Q. Just a smoky sort——

A. It had been blazing but went out.

Q. But there was enough of a dull glare there so you could locate about where it was?

A. I could locate it by the smell.

Q. By the smell, but you could not see any color of any sort?

A. I couldn't see nothing.

Q. At the place?

A. It had been blazing but went out.

Q. Well, at the time that you came down there, or went up there, going north on that track, there was not any glow of any sort by which you could locate the exact place?

142 A. Of the hot box?

Q. Of the hot box?

A. Only the smell.

Q. You said that there was no signal of any sort given as to change of speed of the train or indicating that you were about to get off, or anything of that sort. Did you say anything at — about the time you got off?

A. Who to?

Q. To the engineer?

A. I was not riding with the engineer, I was on the rear end of the tender.

Q. Well, to Van Winkle, who was riding on the other end of the footboard?

A. No, I hadn't spoke a word to him.

Q. Spoken no word to him or——

A. Nobody.

Q. The engineer or anyone on the engine?

A. Not after I got on.

Q. Now, as to distances that you have spoken of passing sidings, have you ever made any actual measurements yourself of the distance?

A. No, sir.

Q. You have not. And about the distance of sidings from main tracks, your observation has simply been that which one engaged in performing his own work would make, his mind attracted to the performance of his own work?

A. About the measurements?

Q. Yes.

A. The roadmaster, I heard him say.

Q. Well, I was asking about your knowledge of it yourself,

143 Mr. Wilson. When you gave your estimate of distances between main and passing sidings here, you have never made any actual measurement?

A. No, sir.
Q. Either on this siding at Peninsula or on the siding on any other line on which you ran?
A. No, sir.
Q. You do not know whether you struck the side of this car or did not strike it, do you?
A. No, sir.
Q. You do not know whether you slipped or stumbled, do you, you have no knowledge as to that?
A. I know I did not slip nor stumble.
Q. What is it?
A. Off of the footboard
Q. No, but on the ground?
A. I do not remember after that.
Q. Your last recollection is at the time that you stepped down?
A. Off the footboard.
Q. Did you step with your left or right foot first?
A. I stepped with my left.
Q. With your left foot. And at that time do you remember whether you had your lantern in your left or right hand?
A. I do not.
Q. You have no recollection of whether that foot ever reached the ground or not?
144 A. I have not.
Q. Both feet had not left the footboard at the time that you last remember what took place?
A. I don't know.
Q. Whether you fell asleep there at that time or not, ypu don't know?
A. I don't know.

Mr. Sheean: That is all.

Redirect examination by Mr. Ives:

Q. On this trip from Warwick to Cleveland were you paid for your time?
A. Yes, sir.
Q. And at the time that you told the yardmaster in Cleveland you wanted a pilot, did you say anything else to him at that time?

Mr. Sheean: I object to the form of the question, your honor.
Mr. Ives: I will withdraw that question, and put it in this way: Was that the entire talk you had with him?
Mr. Sheean: That is objected to, your honor, because what he has said here was not in response to any question of mine.
The Court: Objection sustained.

Mr. Ives: That is all.

Adjourned until tomorrow, July 3, 1914, 10 o'clock A. M.

145 FRIDAY, July 3rd, 1914—10 o'clock a. m.

Court met pursuant to adjournment.
Present: As before.

JAMES WILSON, the plaintiff in the above entitled cause, having been previously sworn, resumed the stand for further examination.

Redirect examination continued by Mr. Ives:

Q. Mr. Wilson, what was the destination of those four cars that you had in your train out of Cleveland that night of your injury?
A. Pittsburg, Pennsylvania, Scottdale, Pennsylvania——
Q. Where?
A. Scottdale, Pennsylvania, Youngstown, Ohio.
Q. As you were riding down on the passenger train, on the footboard of the engine there that night just before you were injured, did you notice your train along the side of which your engine was running?
A. Yes, sir.
Q. And how did it appear to you with respect to the distance from your engine?
A. It appeared about the usual distance.
Q. What is the overhang of those four cars that you were hauling that night; that is, to what extent did they overhang the rail, outside of the rail, over the track on which they were run-
146 ning?
A. About 32 inches.
Q. You have sustained no injuries from the date of those injuries that morning at Peninsula and now, have you?
A. Sir.
Q. You haven't sustained any other injury since you were hurt in connection with that?
A. No.

Mr. Ives: That is all.
Mr. Sheean: There is one matter I forgot, Mr. Ives, that I would like to ask him now. It isn't recross of anything.

Recross-examination by Mr. Sheean:

Q. When I asked you yesterday, Mr. Wilson, about the first trip you made there on the 19th, I think it was, beginning *a* at 4:15 and getting back to Newcastle, you said, I believe, that each of those trips out and in to the terminal counted as one day, that is, as 100 miles?
A. Yes, sir.
Q. How much per 100 miles were you receiving?
A. $3.63.
Q. What is it?
A. $3.63.
Q. So that between 4:15 of the 19th and 10:55 of the next day, 11 o'clock of the next day, your earnings because of these two trips, were twice $3.63?

A. Yes, sir.

Q. Now, that pay for 100 miles would accrue to you no matter what length of time you made that trip in back to Newcastle, providing it was under 10 hours—strike out that question, I
147 want to be perfectly clear. Starting out dead-heading, as you did, without know- how far you would go to pick up the train, you would go out, pick up a train, and if you got back to Newcastle with that train any time within 10 hours, your pay would be for 100 miles?

A. Yes, sir.

Q. Whether you did it in two hours, three hours, or five hours, or took up the ten hours, regardless of distance?

A. Yes, sir.

Mr. Sheean: That is all.

JAMES WHITNEY HALL, a witness called on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Ives:

Q. State your name, please?

A. Hall is my name, James Whitney Hall.

Q. And your business, Mr. Hall?

A. I am a physician and surgeon.

Q. How long have you been that?

A. About 22 years.

Q. How long have you been practicing in Chicago?

A. Twelve years, 13, practically 13 years.

Q. What medical institutions have you been connected
148 with, Doctor, what hospitals, colleges?

A. I am a graduate of the Medical Department of the University of Kentucky, 1891, and then took an interneship at the Hospital at Louisville, and after finishing there located at Bloomington, Illinois, practiced there until I came here, about thirteen years ago. While there I did a general practice of medicine and surgery, connected with both the hospitals in Bloomington during the entire time I was there, practically during the entire time. After coming here I took up general emergency surgery, general surgery. Most of my work has been confined, most of my time was confined to surgery work, or accident surgery, surgery of that character. I have been connected with the various hospitals on the south side. At the present time I am president in charge of the Sheridan Park Hospital.

Q. Do you know the plaintiff in this case?

A. Yes.

Q. And when did you first meet him?

A. When did I first meet him?

Q. Yes.

A. Well, I don't remember the exact date; it was some time the latter part of April.

Q. This year?
A. This year.
Q. At that time did you make any examination of him?
A. Yes, sir.
Q. Tell the jury what examination you made at that time
149 and what you observed?
And thereupon, on the same day, ,hc0
A. The first time I saw him I went to the hospital and had a talk with him; made a very casual examination, didn't strip him; made some superficial examination, and talked to him about his complaints and injuries. Then I saw him the next day, had him remove all of his clothing, made a complete physical examination.
Q. On that occasion what did you observe?
A. The right arm is off at the elbow joint, apparently disarticulated, sticking off at the joint. There is a deformity of two of the ribs on the right side, I think it is the 7th and 8th ribs that are crossed, been fractured and are sticking up, not having been set, not being adjusted and reduced, about the ridge back of the nipple line on the right side, just about in this position (indicating), where I have my thumb. The left collar bone has been fractured, got a marked deformity there, and the ends of it are open, stick up, a sharp point, and one of the other ends of the clavicle is down, I don't remember whether it is the sternal end or end next to the shoulder, which, but it is very much out of place and down very much lower than it should be. There is a marked deformity of the spinal column at the region of what is known as the waist line or small of the back. Technically it is the last or lower part of the dor-
sal vertebræ, and the first two or three lumbar vertebræ are
150 displaced, curved and irregular, abnormally irregular. There is a marked atrophy of both legs, the right leg being much more pronounced than the left. The right leg atrophy is almost complete; that is, there is very little muscle or flesh on the leg. You can feel the leg; it feels just like a piece of skin covering the bones from the hip clear down. The left leg is not so atrophied, not so much, not to such a great degree. There is a paralysis of both legs, partial in the left, practically complete in the right. There is a marked atrophy of the stump of the right arm; also the muscles of the shoulder, right shoulder and upper part of the back, and to some extent the tissues on the side clear down, from the shoulder down the side are atrophied. There has been a fracture of the bones of the nose. There is some deformity now existing. I think that is about all.
Q. Did you notice anything about the scalp?
A. Well, yes. I don't remember very clearly. I think, however, there is a scar and some adhesion on the right side of the head, and I am not very clear about that and I haven't my notes with me, but I know that that was discussed, and as I remember it there was some scar on the left side of the head.
Q. In reference to the back, how did you determine the condition there?

A. I determined it by a physical examination of the back,
151 and subsequently by a skiagraph or X-ray picture.

Q. Are the conditions there such as you can see, look at it?

A. Yes, they are observable, and can be seen or felt.

Q. How many vertebræ are there altogether displaced there?

A. Four, I think; I think it is the last dorsal and first three lumbar.

Q. After that first examination you made, Doctor, did you treat him?

A. Yes, I first examined, and prescribed for Mr. Wilson a number of times, I think the first time that I saw him. I don't remember just how many times, but I visited him rather frequently at the hospital.

Q. What did you treat him for, what did you do?

A. All the objective symptoms, and the treatment was directed to—more to tonics and passive motion of the legs and stump of the right arm, and I ordered electric treatments and massage in the hospital.

Q. Did you treat him for anything else other than these objective conditions that you described?

A. Yes.

Q. What was that?

A. I treated him for his complaints. He complained of more or less pain about the right side, that is, more of the character of numbness and disagreeable feeling and acute pain. He complained
152 also of restlessness, complained that he didn't sleep well; complained of a poor appetite; complained also of some disturbance of the bladder.

Q. And did you treat him for those at all?

A. Yes, sir.

Q. Assuming, Doctor, that last August Wilson was injured, and that injury he——

The Court: I can't hear you.

Mr. Ives:

Q. —that at that time, the time of his injury, he was unconscious for several days, and at that time his arm was taken off, and shortly afterwards his right leg began to atrophy, and have continued to do so until they are in the condition that you found them in as you described here. From that hypothetical state of facts could you form any opinion as to what would cause the atrophy of the muscles of the arm, shoulder and leg, right leg?

Mr. Sheean: I object to the question as not calling for any expert opinion. He hasn't laid a foundation that calls for an expert answer. The question in itself is——

Mr. Ives: Yes, it is a problem that has caused——

The Court: That objection is overruled.

Mr. Sheean: I haven't stated all my reasons, your honor, I object to it on the ground that it is predicated partly on hypothesis and

partly upon the existence of conditions referrable to his own witness' consciousness, without enumerating what they are.

153 The Court: I think that objection is well taken.

Mr. Ives:

Q. I will assume, doctor, that on the 23rd day of August, 1913, a man about 29 years of age was injured. At the time and immediately following the injury for several days he was unconscious; assume that at the time he had injuries to the head, so that there were two scars upon the right side of the—the left side of his head; assume that immediately following his arm was crushed and taken off at the elbow, and assume at that time that his back was broken so that four vertebræ were displaced; and assume that shortly thereafter the muscles of his right leg commenced to atrophy, waste, and that the muscles of his right arm began to waste; and assume that that wasting of the muscles of his right leg and right arm continued until now; and assume that now you find the muscles of his right leg largely gone and the muscles of his right arm and right shoulder largely wasted away. Can you form any opinion as to the cause of the wasting away of those muscles?

A. Yes, sir.

Q. What is your opinion?

A. My opinion is that there has been an injury to the brain on the left side of the head that has caused what is technically known as hemoplegia or paralysis or partial paralysis of the entire right side. That will account for the general atrophy distributed from the shoulder to the entire right side; then the marked and

154 almost complete wasting away of the right leg would probably be influenced to a very great extent by the injury to the back as well as to the head.

Q. Assuming, doctor, all of the facts that I have assumed in this hypothetical question, can you form any opinion as to whether the condition of the hypothetical person's right leg is a permanent condition or one that will recover?

A. Well, it is very largely permanent; that is, a large amount of it is permanent, in my opinion. I think the leg will probably never get any better. The muscles around the shoulder and body might improve some under proper treatment and proper use.

Q. Assume, doctor, a man 29 years of age—Let me ask you first,—what is the condition of the plaintiff's back, as you observed it, in regard to whether the backbone is rigid or not at the place of the displacement, vertebral displacement?

A. Yes, there is a—apparently a complete loss of motion at the point of injury. It is perfectly rigid as far as I could determine without giving the man an anesthetic and putting him to sleep. I was unable to bend his back or have him bend it at that point.

Q. What is the condition of rigidity between normal vertebræ?

A. Well, there is a difference at different points in the

155 backbone. Right at the junction of the——

Q. Well, I mean in the normal body at the place where you found the injury?

A. Well, in the normal body at the point of this injury there is quite free movement; it is where the back is bent in stooping and bending over.

Q. Assume, doctor, a man 29 years of age and with four vertebræ in the small of his back displaced and rigid. Have you any opinion as to whether any improvement can be created in that back by operation or other treatment?

Mr. Sheean: Well, I object to that hypothetical question, your honor; that is, in the hypothetical question, any four vertebræ in the back. It seems to me that this witness knows the particular vertebræ in the case.

The Court: Limit your question.

Mr. Ives:

Q. Assume, doctor, the facts that you have stated, the injury to the back of Mr. Wilson; can you form any opinion as to whether the condition there will improve by operation or other treatment?

A. I am to consider the case and my knowledge of the case?

Q. Yes.

A. I don't believe that this is an operable case. I don't believe it can be operated and improve-. Those vertebræ show both by physical examination and by an X-ray that they are not only displaced and crushed, but they are impacted, and there is really what appears to be a mass of bone now since the callous has been thrown out,
156 and I know of no operation that could be done that would relieve him; in fact, I don't believe that it is a case that would warrant an operation.

Mr. Ives: That is all.

Cross-examination by Mr. Sheean:

Q. Doctor, with the displacement of the ribs that you spoke of in enumerating these injuries here, just give a little more detail as to just what that was.

A. Well, I don't remember the details, except this, that there is a very pronounced displacement there, with a projecting or kind of a bony extension, apparently at the end of the ribs where they have been fractured or crossed; they have not been put in apposition, and have healed out of place instead of in place. That is plain both by physciai examination and by the picture that was taken.

Q. And that was simply what is now a protuberance there where the two ends were not brought into apposition?

A. Yes.

Q. Now, this displacement in the spinal column there. Is that a lateral displacement?

A. Yes.

Q. In which direction?

A. To the left.

Q. To the left?

A. Yes, sir.

Q. And about how much?

A. Well, I would say that if there were a line drawn at the middle of this curve, it is perhaps an inch and a half, an inch and
157 three-qaurters out of line, fully that, I should think; I didn't measure it.

Q. You didn't actually measure it?

A. I didn't measure it, no.

Q. Now, lateral curvature of the spine is not uncommon, doctor?

A. No, it is a common thing to find some deviation.

Q. Some deviation?

A. Yes.

Q. And even to the extent of an inch or an inch and a half?

A. Yes, I think that is true in a great many individuals.

Q. In this particular case one displacement there has become rigid, I believe you said?

A. Yes, it is fixed.

Q. That you could tell by your examination there, by his inability to resist the pain of trying to manipulate it?

A. No, not so much that, but apparent inability to move the back at that point. Now, I want to qualify that to this extent, that those things are in a measure under the control of the patient; the muscles that control the back are voluntary muscles, but my conclusion was on the examination that he couldn't move his back, but it is more or less a subjective matter. Then my opinion was substantiated and confirmed by the picture.

Q. That is, the X-ray that you took?

A. The X-ray picture that was taken of his back.

Q. But a displacement of that sort, to that extent, is not unusual, doctor, in normal individuals?

158 A. Well, the simple lateral displacement in itself, no, would not be especially disabling, but with a crushing of the bone and an impaction of the bone, one into the other——

Q. Well, that was what I was getting at, doctor.

A. Yes, I think that that—the mere displacement or curvature considered alone, irrespective of the other things, would not be of any great significance. You can have a curvature of the spine to that extent that it occurs gradually and it occurs frequently in childhood with no apparent disability.

Q. And the habit curvature that develops to that extent?

A. Yes.

Q. So that in and of itself, the curvature, is not considered alone disconnected with the other things?

A. I would say one could have that much curvature that came on gradually and normally without a disturbance of the bone, that would cause practically no disability.

Q. Now, this atriphy of the left leg, I believe you said, is not nearly as marked as in the right?

A. No, not nearly as much.

Q. The scalp wound that you observed, if you did observe one—you were a little in doubt about that—you didn't attach any great significance to?

A. Well, I attached more significance to it than the scar or wound itself would indicate.

159 Q. That is, in connection with the entire history of the case?

A. In connection with the history of the case and with the paralysis that I found distributed over the entire right side.

Q. Yes.

A. I laid a great deal of stress to the two we had on his head, but to see those scars there without any history, or without any what we call focal symptoms, I wouldn't put much importance to them.

Q. Has there been, doctor, since he has been under your care, any improvement in the muscles around the shoulder and body?

A. I don't think so; I haven't observed any.

Q. But you know of no reason in and about the conditions there why under proper treatment and proper care there may not be improvement there?

A. There may be some improvement around the shoulders and trunk of the body; in other words, I think the paralysis and atrophy that came from the central lesions or the lesions of the brain will improve some, but those that come from the spine, I don't think that it ever will improve. I think that in the legs it comes from the spine.

Q. So that the condition in this right arm you attribute to the brain lesion that you speak of?

A. Yes, sir.

Q. And by a brain lesion, doctor, you mean just what?

A. Well, some break in the continuity really; it is either

160 pressure or a little tear or lesion.

Q. Any interference there of any sort?

A. Any interference, anything that would cause a disturbance of function might be termed a lesion.

Q. And it may be something that will clear up in time?

A. Yes, very frequently a lesion in the brain does clear up following an accident.

Q. A blood clot or anything of that sort that might be there will clear up in time, that clears up in time?

A. Frequently occurs.

Q. Very frequently does. Now, insofar as that being evidence, if there be that brain lesion there, that is limited to the right side, the upper right side, is it?

A. Well, usually it will affect the whole right side to a more or less extent. This case has some complications. We have a condition on the right side, the lower extremities might be wholly accounted for by the injury to the spine; the upper extremities and shoulder and trunk could only be accounted for perhaps by the injury to the brain. Personally I concluded from the symptoms that I found that he had both a brain lesion and spine lesion, a spine lesion that has affected both legs, the right very much more than the left. It is possible that the right leg is made worse by a double lesion both to the spine and to the brain.

Q. Well, now, doctor, did you find any paralysis of any sort on the right side of the face?

161 A. Not that I could observe, and I looked at it very carefully, because I expected to find it there, and I couldn't observe any.

Q. And if there was in fact any brain lesion, it would effect the right arm?

A. Yes, the right arm ordinarily, you will find it between the seat of the lesion and the arm.

Q. And would have a like effect upon the muscles intervening?

A. Especially in the early stages you would find it. Sometimes it clears up in the face and leaves its mark in the body, but you usually find it, and I expected to find it in this patient, but I couldn't observe it. I had electrical tests made of this man, but wasn't present when they were made, and haven't made any myself. They would probably be able to tell you more.

Q. Any atrophy that there is there in the left leg—it is not nearly so marked as in the right?

A. No, it is not nearly as marked.

Q. That is attributable to this injury to the back?

A. I think so; yes, sir; I don't think that the head injury has affected the left side at all.

Q. And you found nothing about the left arm or the upper left part of the body at all indicating any injuries there?

A. No, apparently normal.

Q. Apparently normal?

A. The left arm, shoulder and trunk apparently normal.

162 Q. Mr. Ives spoke of this as a fracture, doctor. Did you observe any fracture or any vertebræ there?

A. Yes.

Q. Which ones?

A. Well, the best we could outline in the picture, there were three surely and perhaps four that had been fractured.

Q. That you determined by the fact that the——

A. By the picture?

Q. By the picture?

A. Yes, and while we couldn't determine—while I couldn't determine it positively by a physical examination, I was quite sure that there had been a fracture from the physical examination I made. The picture shows it.

Q. Doctor, would the fact that there is not now noticeable, if there ever was, any paralysis of any sort upon the right side of the face, have any significance if in fact there was a brain lesion at any time—would it indicate that that is clearing up?

A. That is a symptom or a possibility, yes. He will probably get better in the upper extremities of the right side. That there was no facial paralysis that I observed there, there probably has been some and it has cleared up, and that would indicate that there is some small improvement. The stump of the right arm and the shoulder may improve some; it would be more apt to if he had his

arm so he could use it. The arm being gone and not using
163 that stump perhaps as much as——

Q. Well, then, instead of small, you would put it, would you not, that it probably will improve?

A. I would expect some improvement in that part of his anatomy, especially if he had the proper treatment. In the course of time I would expect his upper extremities on the right side and shoulder to get better.

Mr. Sheean: That is all, doctor.
Mr. Ives: That is all, doctor.

WILLIAM O. KROHN, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Ives:

Q. State your name, please?
A. William O. Krohn.
Q. And you are a physician and surgeon?
A. I am.
Q. And how long have you been practicing?
A. I have been practicing, but the ten years before that I was teaching in various medical colleges, for fifteen years.
Q. And what institutions are you connected with, doctor?

A. I received my degree from Yale University in 1889, and
164 for two years thereafter professor of this line of work, nervous and mental conditions, at Western Reserve University at Cleveland, Ohio. In 1891 I spent a year abroad at the various German Universities that afforded special facilities in my line of work. I returned to this country was made senior teaching fellow at Clark University, Worcester, Mass., in the special study of the brain of Laura Bridgman, the blind deaf mute——

The Court: Is there any question about the qualifications?
Mr. Sheean: I don't question him at all.

Mr. Ives:

Q. Are you acquainted with the plaintiff in this case, Doctor?
A. I am.
Q. When did you first meet him?
A. About seven weeks ago, the first time, I believe, six or seven weeks ago at the hospital.
Q. Did you make any examination of him at that time?
A. Yes, a general examination; that is, saw the more apparent objective conditions.
Q. And were you alone at the time or in the presence of——
A. At that time I believe Dr. Hall was also at the hospital with me.
Q. Tell the jury what examination you made and what you observed?
A. My examination at that time really consisted of two parts, first, as to the gross nervous lesions as a result of the accident, and certain

surgical conditions that obtained. The examination on the
165 nervous side consisted largely of noting the degree of atrophy of affected parts, of noting the reflexes, of the functioning of the different nerves or groups of nerves. The surgical side included the examination of the feet, fractured bones, and the general organic surgical conditions that were apparent.

Q. And what did you observe?

A. I found that there was very marked evidence of a distinct hemoplegia on the right side, I mean a partial paralysis of the right side of the body. I might repeat that that was due to some injury or condition in the brain on the left side. I found also a marked atrophy of the right leg, practically skinned and the bone, flesh had atrophied and wasted until there was nothing but the skin covering the bone; the muscles have practically all wasted away. The reflexes were on the two sides different in this respect, those on the right side were listed with some difficulty, but came more briskly when they were aroused and the evidences of injury were so complex it was necessary to arrange for a chemical stimulation for the testing of the nerves, which I did later. On the surgical side I found that, I believe, the 7th and 8th ribs had been fractured about in the middle portion of the ribs, and were projecting outwardly in an irregular mass. I found the last dorsal vertebræ, the last, the
12th of the dorsal series of backbone, I found that and the
166 first three lumber backbone or vertebræ broken, fused together and impacted. I found that the muscles of the shoulder as well as of the lower extremities on the right side had atrophied to an extreme degree. Certain -trophic changes by means of which—by which I mean certain changes that show a marked lack of nutrition of the skin and of the nails of the foot, showing that the nerves that had control of the nutrition of that side of the body were also markedly affected. I found also the amputated left arm, I almost forgot that.

Q. Right?

A. Right arm, I beg your pardon, yes, right arm. The pupils of the eyes were unequal, but it responded within the normal range to light and to accommodation. Some asymmetry on the inside of the mouth, slight deviation of the tongue and of the uvula or pit-like places in the back of the mouth, which were to me evidences of plain meaning. That is about all of that examination.

Q. You say you gave him some electric tests?

A. That was in my office. He was brought to my office, I think it was about two weeks ago, where I had access to the galvanic current to test and find out what nerves were really dead and what were possibly alive. I found—Oh, before that, I also found at the hospital, a marked ankle clonus; that is, by pressing sharply against
the sole of the foot, a quivering vibration of the legs
167 set up, which is always found, which is only found in an injury or a degeneration or disease of the cords. That was so marked that by pressing the hand into the cheeks of the buttock, it caused that same clonus to affect the back. It is an unusual, extreme clonus. The test with the galvanic current showed that the

majority of all the nerves in the right limb were dead, had simply died; that there was both a qualitative and quant-ative change by the galvanic current tests; it showed that there were a few portions just below the knee that would respond to the electrical stimulation. The electrodes placed over the prostate gland, the small electrode, the large electrode over the abdomen, showing that there was no—well, that impotency had set in from some cause or other. The same death of nerves occur in a portion of the upper half of the right side of the body, degeneration and death of the nerves. On the left side there were no qualitative changes in the nerve action, and by a proper treatment and massage I think that they will practically recover on the left side of the body. The responses on the left side of the body were practically all within the normal range, though there was a lessened state of nutrition, and the left side of the body was smaller, showing that it had functioned and become flabby. That is about the findings as I recall them.

Mr. Ives: Cross examine.

168 Cross-examination by Mr. Sheean:

Q. Doctor, if I understand your testimony, the latter part, there is nothing from the electric test that indicates the actual death of any nerve on that side, only a matter of nutrition?

A. Yes, the nutrition; the sympathetic nerve system seems to be disarranged on the left side.

Q. And in proper time you see no reason why the left side should not become entirely well?

A. With proper treatment over sufficient length of time.

Q. Yes?

A. There is a low state of vitality that can be built up.

Q. Then is there, doctor, any death of the nerves on the right side of the face?

A. Yes.

Q. Where?

A. The nerves that to a certain extent control the operation of the smaller muscles around the eyes, and cause the mouth, not enough to make the distorted mouth in rest, but as you stimulate you get a quantitative change; they are not so sprightly, not so energetic where the fibers of each nerve are operating.

Q. That was purely quantitative?

A. That was quantitative rather than qualitative; that is, not all the nerves—that is, every little fiber of the nerve hadn't died, but certain little fibers in this little nerve rope had died.

169 Q. It took more energy to wake it up and get action and response, and that required the application of the current to detect that, did it?

A. Yes. To detect the differences in the change of the poles from negative to positive, anode to cathode, closed and open current.

Q. Now as to the right side, doctor, while there can't be any great improvement there, there may be some improvement there with proper treatment?

A. I believe that with thorough painstaking continuous effort of a remedial nature, that is, including massage and electrical treatment, that you can keep it from getting any worse. I don't believe that you can make it much better. You can keep alive the few little tendrils of nerves that are there yet.

Q. That is on the right side?

A. On the right side, yes.

Q. But as to the left side, you see no reason why they couldn't become probably normal?

A. With the proper extended course of treatment.

Mr. Sheean: That is all.

Mr. Ives: That is all.

Whereupon Mr. Ives read the deposition of George Huber to the jury, in the words and figures following, to-wit:

170 Counsel for plaintiff then read in evidence the deposition of George Huber, a witness on behalf of the plaintiff, which deposition is in words and figures following, to-wit:

GEORGE HUBER, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Ives:

Q. State your full name, please.

A. George Huber.

Q. You live here in Peninsula?

A. I live in Rittman, Ohio; Wayne County.

Q. And your business is what?

A. Insurance agent.

Q. How long have you been in that business?

A. About five weeks.

Q. What was your business before that time?

A. Station agent for the Erie Railroad, at Rittman, for five years.

Q. Were you ever in the employ of the defendant, the B. & O. Railroad Company?

A. Yes, sir; been in their employ for six years.

Q. In what capacity?

A. Station agent, at Peninsula.

171 Q. You made certain track measurements here at my request, did you not?

A. Yes, sir.

Q. Where; in a general way, where were the measurements that you made?

A. Well, they were about—The measurements that were made were made about thirteen or fourteen rail lengths from the west end of the passing siding, going south.

Q. How many rails from the west end of the passing siding?

A. About fourteen.

Q. What direction does the B. & O. Railroad run in Peninsula, or through Peninsula, that is, the actual direction?

A. Well, it runs northwest and southeast, as near as I can tell.
Q. And when you say the west end of the passing track, you mean the northwest end?
A. That is right,—it runs northwest and southeast, yes, sir.
Q. And when you were there yesterday, did you measure the length of any of the rails there?
A. Yes, sir. A thirty-three foot rail. I measured one rail.
Q. Did you notice whether the rails in the tracks were of different lengths, or whether they were the same apparent length?
A. The same apparent length.

Q. Now, what other measurements did you make, beside
172 the measurement of the rail length?

A. I measured the distance between the passing siding and the main track.
Q. And where did you make the first of those measurements?
A. The first measurement I made at the east end of the fourteenth rail.
Q. Who assisted you in making those measurements?
A. Mr. Kroell.
Q. What did you use in making the measurements?
A. Used a standard or six-foot tapeline
Q. And at the southeast end of the 14th rail from the switch frog to the north, you say you made a measurement?
A. To the south?
Q. Yes.
A. Yes, sir.
Q. As I understood you, you made the measurement between the east rail of the main track,—that is, it would be the northeast rail of the main track and the southwest rail of the siding to the east of it?
A. Yes, sir.

Mr. Sheean: I object to it on the ground that no proper foundation has been laid, and to all the other testimony about the measurements, no proper foundation having been laid.

Mr. Ives:

Q. What was the measurement you made?

A. Six feet and nine inches.

173 Q. And in making that measurement, where did you measure from precisely? That is, from the edge of the rail of the top of the rail?
A. From the center of the top of the rail.
Q. Of each rail?
A. Yes, sir.
Q. Now, where did you make the next measurement?
A. At the end of the fifteenth rail—that measures six feet seven and a half inches.

Mr. Sheean: I object to the last part of the answer, as not responsive.

Mr. Ives:

Q. You mean the northeast end of this fifteenth rail?
A. Yes, sir.
Q. And what was your measurement there?

Mr. Sheean: I object to that, no proper foundation having been laid for the testimony.

Mr. Ives:

Q. You may answer.
A. Six feet, seven and a half inches.
Q. And was that measurement made between the same points as the former measurements?
A. Yes, sir.
Q. Where did you make your next measurement?
A. At the end of the sixteenth rail.
Q. The southeast end?
A. Yes, sir.
Q. And what was that measurement?

Mr. Sheean: Same objection.

Mr. Ives:

Q. Answer the question.
174 A. Six feet, eight and a half inches.
Q. And was that measurement from the same place, from the center of the tops of the rails?
A. Yes, sir.
Q. And where did you make your next measurement?
A. At the southeast end of the seventeenth rail.
Q. And what was that measurement?

Mr. Sheean: Same objection.

The Witness: Six feet and eleven inches.

Mr. Ives:

Q. Was that between the same points on the rails?
A. Same points, yes, sir.
Q. And where did you make your next measurement?
A. At the southeast end of the eighteenth rail.
Q. And what was that measurement?

Mr. Sheean: Same objection.
The Witness: Six feet, eleven and a half inches.

Mr. Ives:

Q. That was between the same points?
A. Yes, sir.
Q. Where did you make your next measurement?

Mr. Sheean: Same objection.

The Witness: At the southeast end of the twenty-fifth rail.

Q. And what was that measurement?

Mr. Sheean: Same objection.

The Witness: Seven feet, one and a half inches.

Mr. Ives:

Q. Was that between the same points on the rail?

A. Same points, yes, sir.

175 Q. Where did you make the next measurement?

A. At the southeast end of the thirtieth rail.

Q. And what was that measurement?

Mr. Sheean: Same objection.

The Witness: Seven feet, four and a half inches.

Mr. Ives:

Q. It is a single main track through the town here, is it not?

A. Yes, sir.

Q. Were you here in Peninsula from the month of March to the month of August, the latter part of August, 1913?

A. Yes sir, I was. I walked from Boston Mill to Peninsula about a week after the flood. That was some time in March.

Q. And did you observe at that time what the condition of the tracks was at the place where you made these measurements yesterday, and to the north of that place, up to the track that you have mentioned?

A. Yes, sir.

Q. What was the condition of the track at that time?

Mr. Sheean: I object to that, unless it is confined to the time of the accident.

Mr. Ives:

Q. Go ahead and answer.

A. The conditions of the track were—in fact, from down from the cut to the river bridge, up by the west end of the siding and up to the railroad crossing here, the right of way was practically all washed out; in places the tracks were hanging at that time.

176 This was right after the flood.

Q. Do you know what was done on those tracks afterwards?

A. No, I do not. I was not here after that.

Q. Were you here in the month of August of that year, or along about that time?

A. I could not say.

Q. Or a month or so before that time?

A. I don't remember whether I was here or not.

Q. From where you made these measurements yesterday, that is, the measurement at the southeast end of the fourteenth rail, looking northwest from between the main track and the siding, could you observe any apparent difference in distance between those tracks, from what it was at the end of the fourteenth rail?

Mr. Sheean: Same objection.

The Witness: No, sir; all apparently the same distance, from the fourteenth rail north.

Cross-examination by Mr. Sheean:

Q. You were here during the flood?
A. I was here the week after the flood.
Q. That was in March 1913, wasn't it?
A. Yes, sir.
Q. How long after that did you leave here,—how long were you here after the flood?
177 A. I was only here for a day. It was on a Sunday. I left Sunday evening. I merely came down to see what damage the flood had done.
Q. Then, were you in Peninsula after that day?
A. I was here different times; probably for five or six weeks, I would come down to visit my wife's folks, but I was not here steady.
Q. You were not here to know anything about the condition of the tracks that you testified to?
A. Not after the time I see it right after the flood.
Q. And that was immediately after the flood, in March?
A. Yes.
Q. When was it you were employed by the B. & O. over here at Peninsula?
A. I was with the B. & O. from 1901 to 1906; I worked for them as agent at Brecksville and Boston Mill and also here in Peninsula, as relief work, after I worked at Boston Mill.
Q. When did you make these measurements you speak of?
A. I made them yesterday afternoon, about two o'clock.
Q. You don't know whether the tracks were the same in August, 1913, do you?
A. No, I don't; I could not say.
Q. You don't know anything about distances that these tracks were apart in August 1913?
A. No, sir.
Q. Who was with you when you took these measurements yesterday?
A. Mr. Kroell, and the other gentleman there.
178 Q. Mr. Ives?
A. Ives, yes, sir.
Q. What end of the tape did you hold when you made these measurements?
A. The end towards the reel.
Q. You took the measurements down, did you?
A. Yes, sir.
Q. And did any of the other gentlemen take them down?
A. No, sir.
Q. Did they compare with you the tape, or did you do that yourself?
A. No, I did that myself. I called the figures myself. I had the end of the tape towards the reel, the big figures.
Q. Did you make a memorandum?

A. Yes, sir.
Q. You testified in this examination from a memorandum, didn't you?
A. Yes, sir, from this paper.
Q. Have you any independent recollection outside of this memorandum—can you give the figures?
A. No, I couldn't, not without the memorandum.
Q. —that was used. You couldn't give the figures independent of the memorandum that you testified from in this examination?
A. No, sir.
Q. And your examination on direct here, was read from a memorandum that you took down, yesterday, wasn't it?
A. Yes, sir.
Q. And not from your own recollection?
A. No, sir.
179 Q. Was that the memorandum that you took down yesterday?
A. Yes, sir.
Q. Now, in this memorandum—you probably testified to this on direct—but where did you measure from, that is, from what rail to what rail?
A. Well, measuring from the fourteenth rail, I measured from the two nearest rails on the passing siding and the main track.
Q. Well, in that measurement did you use the same rails on all those measurements?
A. Yes, sir.
Q. That is, from the inside of the main to the closest rail——
A. The nearest——
Q. On the passing track?
A. Yes, sir.
Q. That is, you measured from the center of the tops of the rails?
A. Yes, sir.

Mr. Sheean: The defendant moves that all this testimony of the witness be stricken out, because it is not shown that the condition is the same now as it was at the time of the accident, as to measurements of distances or condition of the track.

Redirect examination by Mr. Ives:

180 Q. After examining that memorandum that you made yesterday, can you testify from recollection that the figures you have given here are correct?
A. Yes, sir.
Q. And do you so testify?
A. Yes, sir.

Recross-examination by Mr. Sheean:

Q. Well, you read in your testimony, from that memorandum, didn't you?
A. Yes, sir.
Q. And could you now lay aside that memorandum and testify

to these distances from your recollection, without referring to the memorandum?

A. No, I could not.

Redirect examination by Mr. Ives:

Q. But after you do refer to the memorandum, you know that your recollection is correct?

A. I know it is correct, yes.

Re-recross-examination by Mr. Sheean:

Q. Have you any recollection at all, independent of the memorandum, of these distances?

181 A. No, I would not have a recollection of all of them.

Q. Of any of them—independent of the memorandum?

A. No, sir.

Re-redirect examination by Mr. Ives:

Q. Without looking at the memorandum can you give me the distance at the south end of the fourteenth rail, the first measurement you made?

A. Six feet and seven inches.

Re-redirect examination by Mr. Sheean:

Q. You get that six feet and seven inches from the memorandum as you read it a moment ago, and not from any recollection of the measurement as you made it yesterday? Is that true?

A. How is that?

(Question read by reporter.)

A. Well, I didn't make a business of memorizing it.

Q. Well, I want to know how your memory is; is it from the measurements you made yesterday, or from the memorandum, that you now say it is six feet and seven inches?

A. I think it is from both. I think it was six feet seven inches and a half,—I remember now.

182 Re-redirect examination by Mr. Ives:

Q. You know now, do you, Mr. Huber, that at the time you made this memorandum yesterday, the figures were correct?

A. Yes, sir.

183 Counsel for plaintiff then read in evidence the deposition of George Bergdorf, a witness on behalf of the plaintiff, which deposition is in words and figures following, to-wit:

GEORGE BERGDORF, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Ives:

Q. What is your name, please?

A. George Bergdorf.

Q. You live here in Peninsula, do you, Mr. Bergdorf?
A. Yes, sir.
Q. How long have you lived here?
A. Eleven years, the first of last March.
Q. What is your business now?
A. I am in the butcher business.
Q. How long have you been in that business?
A. Since the seventh of March.
Q. This year?
A. Yes, sir.
Q. And what was your business before that?
A. I was working for the Vermilyea & Thomas Milling Company.
Q. For how long?
A. From August 1st up to the 1st of March, or make it about the 5th of March.
184 Q. Previous to August 13th what was your business?
A. I was working for the B. & O. as section foreman.
Q. How long have you been section foreman for them?
A. Well, about—I couldn't say just exactly—something like ten years.
Q. How much of that time in Peninsula?
A. Well, about ten years or over; ten years the first of March 1913.
Q. Did your section over which you were foreman include all the tracks of the B. & O. in Peninsula?
A. Yes, sir.
Q. During the time that you were employed by the B. & O. as section foreman, did you learn whether or not there was any standard gauge or standard distance between the main tracks and side tracks?
A. Yes, sir.
Q. What was such standard gauge or standard distance?
A. The standard gauge is four feet, eight and a half inches.
Q. That is between the rails of the tracks?
A. Yes, sir.
Q. But between the main track and the side track, the distance between the main track and the side track, is there any standard gauge there?
A. Thirteen foot centers.
Q. When you say thirteen foot centers, you mean thirteen feet from the center of the main track to the center of the siding?
185 A. Yes, sir.
Q. Next to the main?
A. Yes, sir.
Q. And where did you get that information?
A. From the supervisor.
Q. Who was the supervisor?
A. Thomas Delaney.
Q. What was his business?
A. He had charge over all the section men.

Q. There was a flood here in March 1913, was there?
A. I think so.
Q. What was the effect of that flood on the railroad tracks here in Peninsula?
A. Well, it put them out of commission.
Q. What do you say is the direction that the B. & O. main tracks run, passing through Peninsula?
A. Well, they call it east and west, but it is nearly north and south through here. They call the main lines east and west.
Q. What is usually called the west end of the siding, is really the north end?
A. Yes, sir.
Q. Now, what was the condition of the tracks between about ten or twelve car lengths sough of the frog, at the north end of the siding?

Mr. Sheean: When was that, Mr. Ives?
Mr. Ives: Immediately after the flood?
Mr. Sheean: I object to that as not being confined to the time of the accident.

186 The Witness: Why, they were practically all washed out, the tracks down through there.
Q. What do you mean by 'practically all washed out'; were the rails and ties and everything washed away?
A. No, the ballast was washed out; the main track was hanging; the side tracks were washed down again one another and down again the main.
Q. Did you have anything to do with repairing the conditions there after the flood?
A. Yes, sir.
Q. What did you do?
A. Why, I lined them together, blocked them up so they could run over them.
Q. Do you know what the conditions were ten or twelve car lengths south of that frog, in the month of August 1913?
A. I could not say.
Q. Do you know whether any changes had been made?
A. No changes that I know of
Q. You have lived here ever since August 1913, I believe, you said?
A. Yes sir.
Q. Do you know whether the tracks have been widened; that is, whether after the month of August 1913, until now, the siding has been moved, the siding or the mani track, ten or twelve car lengths south of the frog—whether they have been moved in any way?
A. I don't think they have. I was down there a week ago last Sunday, the first time I have been down there since I left
187 the service of the B. & O. and they practically looked the same to me, to my estimation.
Q. The same distance apart?
A. Yes, sir.

Cross-examination by Mr. Sheean:

Q. When did you leave the section here in Peninsula?
A. The first of August.
Q. 1913?
A. 1913.
Q. So that personally you don't know anything about the condition of the tracks down there after that time?
A. No, sir.
Q. You don't know, as a matter of fact, of your own knowledge, whether those tracks have been shoved one way or other since you left over there, do you?
A. I do not.
Q. Do you know the distance apart those tracks were at the time you worked there?
A. No, sir, I could not say.
Q. And you have never measured them since?
A. No, sir.
Q. If the measurement of the distances were taken yesterday, you don't know whether they would be less or greater distance than they would be in August 1913?
A. No, sir, I could not say.

188 Q. There is a curve between those two switches, isn't there?
A. Yes sir.
Q. And there is a curve in the side track too, isn't there?
A. Yes, sir.
Q. Isn't it a fact that the—well, the high side of the curve would be on what side?
A. The outside of the curve would be on the high side.
Q. What side of the track would that be on?
A. It would be on the east side of the track. It would be the rail next to the passing side.
Q. Do you know how much higher that was than the other rail of the main track?
A. Three inches.
Q. And the passing track was built on the level?
A. Yes, sir.
Q. That is, both rails?
A. Yes, sir.

Mr. Sheean: I move that the testimony of Mr. Bergdorf as to the condition of the track be stricken out, during the year 1913, as not being confined to the time of the accident.

Redirect examination by Mr. Ives:

Q. All you know about it, Mr. Bergdorf, is that when you came down the track, it looked to you the same distance between the tracks there, that is, the main track and the siding—as it did when you quit the work?
A. Yes, sir.

189 Recross-examination by Mr. Sheean:

Q. You didn't notice how it looked yesterday, did you?
A. No, sir, I was not down there yesterday.
Q. You haven't been down there for the last week?
A. A week ago Sunday is the first time I have been there since I left the service.
Q. And at that time you casually looked at it?
A. Yes, sir.
Q. You don't know the distances?
A. No.
Q. Nor whether the track had been shifted or not?
A. No, sir.

190 Counsel for plaintiff then read in evidence the deposition of P. L. Williams, a witness on behalf of the plaintiff, which deposition is in words and figures following, to-wit:

P. L. WILLIAMS, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Ives:

Q. What is your name?
A. P. L. Williams.
Q. Where do you live, Mr. Williams?
A. Akron, Ohio.
Q. What is your business?
A. Conductor on the Newcastle Division.
Q. Of what railroad?
A. B. & O.
Q. How long have you been conductor for that road?
A. Three years.
Q. Before you were conductor, were you employed by that railroad?
A. Yes, sir.
Q. In what capacity?
A. Braking.
Q. How long were you employed as a brakeman?
A. About eight years, or better.
Q. Do you remember the occasion of an accident to J. B. Wilson, in the month of August 1913, here in Peninsula?
191 A. Yes, sir, I mind of that accident down here.
Q. And where were you at the time?
A. I was at Akron when it happened.
Q. After that what did you do?
A. I was called to come down here and relieve him.
Q. And what time did you come to Peninsula after that?
A. I came down here on Number 5.
Q. What time in the morning?
A. Shortly before seven o'clock; I wouldn't just say what time it was, what time I arrived here.

Q. And when you reached here, what did you do?
A. Went down to the lower end of the siding.
Q. By the "lower end of the siding," do you mean the north end of the siding?
A. The north end. I put the caboose on the rear end, and then looked around down where Conductor Wilson got injured.
Q. Did you come here to take charge of Wilson's train?
A. Yes, sir.
Q. What was the train composed of?
A. Ore cars.
Q. Ore cars? How many cars were in the train when you arrived?
A. Thirty-nine cars, I think there were.
Q. Where was the train when you arrived here?
A. On the siding, part of it—part of it backed into the spur track that leads off of the siding.
Q. Did you see any one here that you knew, any brakeman?
A. I saw Cearfoss,—is that his name?
192 Q. He was here at the time?
A. He was here at the time.
Q. Was he with you at any time up on the north end of the siding? Together with you?
A. I guess we were all together, coming down and putting on the caboose.
Q. Did you notice anything between the main track and that siding, or on either of the rails there?
A. After we got the caboose on there, he pointed out where he got his arm cut off on the rail.
Q. Same place?
A. Same place.
Q. What did he point out?
A. The spot that was on the rail where he had been——
Q. At that point where he pointed out the spots on the rail, did you notice the distance between the east rail of the main track and the west rail of the siding?
A. Yes, I noticed the distance in there.
Q. What did you notice about the distance?

Mr. Sheean: There is a motion to strike out this answer.
The Court: Let it go out.
Mr. Ives: Then the next question: "Describe it, Mr. Williams, as well as you can, without stating a conclusion."
Mr. Sheean: The same motion.
The Court: Let it go out.

Mr. Ives (continuing reading):

Q. About how much clearance room would there be be-
193 tween that car on the siding and the car on the main track?
A. I should judge between one and two feet.
Q. Did you notice anything in reference to the condition of the road bed or ground between the east rail of the main track and the west rail of the siding, at that point?

Mr. Sheean: There is a motion as to that.
The Court: All of it, or just one word?
Mr. Sheean: Just the last part of the second sentence?
The Court: You mean all of that sentence?
Mr. Sheean: All of that sentence, I think, as the sentence would not be complete without that.
The Court: No, I don't think so.
Mr. Sheean: The motion as made at the time, I think, was this second sentence.
The Court: Strike out the one word. The objection is not specifically made that the answer was not responsive to the question.
Mr. Sheean: The mortion was as to two words.
The Court: I know, but it was not based on the ground that the answer was not responsive to the question. I think it was proper for the witness to have used the one word, but not the combination of words.
Mr. Ives: The word that is to be stricken out is the word "awful."
The Court: Well, that is what I meant. I didn't want to use it, though.

194 Mr. Ives (continuing reading):

A. Yes, they had been unloading slag there, loose. It was awful rough in there.

Mr. Sheean: I move that that answer be stricken out, the "awful rough" part of it.

Mr. Ives:

Q. Do you know the usual and ordinary distance between the rails—the adjoining rails, of main tracks and sidings on the B. & O. track?
A. Well, I think it is fourteen feet from center to center.
Q. That is, fourteen feet from the center of the rails——

Mr. Sheean: I move that that be stricken out as not responsive to the question.

Mr. Ives:

Q. The Newcastle Division is the division that you have been on principally?
A. Yes, sir.
Q. What is the usual distance on that division——
A. Fourteen feet, I think it is.
Q. What other divisions have you been over, personally, enough so that you have noticed the distances?
A. I have travelled the Cleveland division.
Q. What have you noticed about distances, on the Cleveland division, generally speaking?
A. Well, some of them—I never did pay much attention to them in different places.
Q. You haven't travelled over the Cleveland division?

A. I haven't travel-ed over it enough to notice the dis-
195 tances,

Q. Is there any division that you have traveled over enough so that you know those distances?

A. I don't think there is; I have been on the Newcastle division pretty near all the time.

Cross-examination by Mr. Sheean:

Q. Do you know, Mr. Williams, what the standard is, from center to center, or is that just your estimate—fourteen feet?

A. I understood it was fourteen feet.

Q. You are sure it is not thirteen—it may be for all you know?

A. I wouldn't positively say—either thirteen or fourteen.

Q. It may be thirteen, for all you know?

A. Yes.

Q. You relieved Conductor Wilson that night, didn't you?

A. That morning.

Q. It was the morning of the 23rd?

A. Yes, sir.

Q. Early morning?

A. Yes, sir.

Q. You came up from Akron?

A. I came down from Akron.

Q. When you arrived here at Peninsula, the train was then on the siding, was it?

A. Yes, the train was on the siding when I got here.

196 Q. And the main track was clear?

A. The main track was clear.

Q. Where was the car with the hot box—there was a hot box wasn't there?

A. That car had already been set off.

Q. Was that on the——

A. That was on the spur track.

Q. So, when you left here, you left with the engine and caboose and thirty-nine cars?

A. Thirty-nine cars, and a double headed engine I had on.

Q. You got here about seven o'clock, you say?

A. About seven o'clock, I judge; the train was a little late. I have got the time in the time-book, but I haven't it with me.

Q. Brakeman Cearfoss pointed out the place of the accident?

A. Yes, sir—to me.

Q. About where was that, with reference to the east track?

Mr. Ives: Not the east track.

Mr. Sheean: The north.

Mr. Ives: Well, north really, but——

A. West or north—I judge about ten or twelve car lengths from the switch.

Q. From the north or west switch?

A. Yes.

Q. What cars have you in mind when you say car lengths or what distance?

A. What distance that would be?
Q. Yes.
A. I judge it would be about—I guess round thirty-five feet to the car.

197 Q. Do you know how long those ore cars were?
A. About thirty-five feet they run, I think.
Q. Were there cars standing there—any cars standing on the main track?
A. No, no cars standing on the main track; the main track was clear.
Q. How did you estimate the distance then, when you say the distance between cars on the main and on the siding would be between one and two feet?
A. That is, if there were cars on the main and cars on the siding, I judge it would be about—between one and two feet of clearance.
Q. Well, between one and two feet—about what do you think it would be?
A. Oh, that is pretty hard to tell; I should judge it was in between that.
Q. You didn't make any measurement?
A. No.
Q. Didn't make any measurement at all?
A. No.
Q. That is just simply an estimate on your part?
A. An estimate.
Q. You are in the service of the B. & O.?
A. Yes, sir.
Q. What division now?
A. Newcastle.
Q. What division is this?
A. This is Cleveland Division.

198 Counsel for plaintiff then read in evidence the deposition of H. D. Matthews, a witness on behalf of the plaintiff, which deposition is in words and figures following, to-wit:

H. D. MATTHEWS, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Ives:

Q. State your name, please.
A. H. D. Matthews.
Q. Where do you live, Mr. Matthews?
A. Akron, at present.
Q. What is your business?
A. Not doing anything right now.
Q. What has been your business?
A. I have been working for the B. & O.
Q. In what capacity?
A. As conductor and as brakeman.
Q. How long have you been conductor?

A. Since the 5th of March, 1913.
Q. March 5th, 1913——
A. Until along in March some time, in 1914.
Q. And previous to that time you were a brakeman?
A. Yes, sir.
199 Q. How long had you been braking for the B. & O.?
A. Since April 1907.
Q. Over what division of the road did you rin, as brakeman and conductor?
A. Newcastle and Cleveland divisions.
Q. Newcastle and Cleveland divisions?
A. Yes, sir.
Q. The Cleveland division is the division that runs through Peninsula?
A. Yes, sir.
Q. And do you know the usual distance between the near rails of the main tracks and sidings, on those divisions that you have run over?
A. Well, they run nine feet—about nine feet fror rail to rail.

Cross-examination by Mr. Sheean:

Q. Do you know the distance, Mr. Matthews, from center to center?
A. On the Cleveland division, no, sir; I don't know what that is.
Q. Do you know the distance from center to center on the Newcastle division?
A. That runs fourteen feet.
Q. You are sure that is not thirteen?
A. Well, I never took the measurement myself.
Q. So that you don't know positively?
A. Not positively.
Q. What those distances are?
A. No, sir.
200 Q. But you think it may be thirteen feet, so far as you know?
A. No. I don't think it would be any less than fourteen feet?
Q. But still you don't know?
A. Not positively.
Q. Now, when you say nine feet between rails, that is between the nearest rails of the siding and the main tracks?
A. Yes, sir—all inside rails.
Q. Did you ever measure that distance?
A. Never measured it myself, no, sir.
Q. You are just simply estimating that?
A. Yes, sir.
Q. You don't know of your own knowledge what that distance is?
A. No, not exactly.
Q. And you don't know of your own knowledge just what the distance from center to center is?
A. No, sir.
Q. On either the Cleveland or Newcastle division?
A. Not positive.

Q. What proportion of the time you have been employed by the B. & O. have you worked on the Newcastle and on the Cleveland divisions?

A. Well, a portion of the time we run on the Newcastle and a portion on the Cleveland, at any time.

Q. You worked as much on the one as on the other?

A. No, sir, I worked more on the Newcastle.

Q. You worked a good deal on the Cleveland division?

A. Well, I did for the year 1913.

Q. Did you ever make an estimate of the distances between
201 the tracks on the Cleveland division?

A. Why, I did today. I walked down there and estimated the distances between the siding and the main track here at Peninsula.

Q. I mean, during the time you were working in the Cleveland division.

A. Well, I didn't pay any special attention.

Redirect examination by Mr. Ives:

Q. From the estimations you made of the tracks here in Peninsula today, can you say whether there have been any changes or not in the distance of the main tracks to the siding from what it was in 1913?

A. No, sir, I didn't notice any.

Mr. Sheean: That is objected to, no proper foundation having been laid for the question.

Mr. Ives:

Q. You say you could notice no difference?

A. No difference in them.

Recross-examination by Mr. Sheean:

Q. When did you run over this track in 1913?

A. Well, I could not give you the exact dates, but along in June and July, up until about the 1st to the 10th of August.

202 Q. 1913?

A. Yes, sir.

Q. How did you come to observe the distances at that time; did you ever take any measurements?

A. Never.

Q. You didn't take any this morning?

A. No, sir; I had nothing to take them with.

Q. You don't know but what there might have been a shift one way or other in those tracks since 1913?

A. Well not enough—there has been nothing done that would be notic-able. The tracks were not changed a bit that I could see.

Q. But you do know, as a matter of fact?

A. I do not.

Q. You never made any measurements, either in 1913 or this morning?

A. No, sir.

Re-direct examination by Mr. Ives:

Q. And from the observation you made this morning, and from the observation you made in running over the road, can you state whether this siding here in Peninsula is closer or the same or further away from the main, than the usual distance between main and side tracks?

Mr. Sheean: "Sidetracks." That is objected to, your Honor a lot of colloquy there.

Mr. Ives: I withdraw it.

203 Mr. Sheean: There is about a page of talk without anything to it.

Mr. Ives: Yes, withdraw it.

The Court: All right.

204 Counsel for plaintiff then read in evidence the deposition of Guy S. Briggs, a witness on behalf of the plaintiff, which deposition is in words and figures following, to-wit:

"GUY S. BRIGGS, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Ives:

Q. State your name, please.
A. Guy S. Briggs.
Q. Where do you live, Mr. Briggs?
A. 3282 West 17th street, Cleveland, Ohio.
Q. What is your business?
A. Locomotive engineer.
Q. By whom are you employed?
A. May 19, 1903.
Q. By the Baltimore & Ohio?
A. Yes, sir.
Q. Been an engineer since 1903?
A. No, 1907.
Q. Over what lines of that road do you work?
A. Well, the C. T. & V. District, and the C. L. & W., and about ninety miles of the Newcastle division.
Q. You run trains over the Cleveland division?
A. Yes, sir.
Q. And that is the C. L. & W.?
A. The C. L. & W. and C. T. & V. both.

Q. Do you remember the occasion of an injury to James
205 B. Wilson?

A. I do.

Q. You were an engineer, out of Cleveland that night?
A. Yes, sir.
Q. He was the conductor of that train?
A. Yes, sir, he was.
Q. Of course you remember the occasion of his injury in Peninsula?
A. Yes, sir.

Q. What was the first thing you knew about his being hurt?
A. When the fireman on the train come up and told me. I was standing right out here——
Q. There were two engines on that train that night, were there not?
A. Yes, sir, there was five cars between them.
Q. Was your engine the first engine or the second engine?
A. The first engine.
Q. Then there was five cars back of your engine, and then come the second engine?
A. Yes, sir.
Q. When you heard that Wilson had been injured, what did you do?
A. I went back there to where he lay.
Q. Where did you find him?
A. He was lying just to the front of the engine, by the other engine.
Q. That engine was standing still, was it?
A. Yes, sir.
Q. And standing on the siding?
A. Yes, sir.
Q. Just next to the main track?
A. Yes.
Q. And there was a train of ore cars on the main track?
206 A. Yes, sir.
Q. Did you notice a car with a hot box in it?
A. Yes, sir.
Q. Where was that car?
A. The eighth car from the hind end.
Q. Was it the eighth car counting the caboose, or——
A. Ninth car, counting the caboose.
Q. And which direction from where Wilson lay was the car with the *not* box, do you remember?
A. I couldn't say, just exactly. I can't' tell you which way the hot box was, but he was lying at the car where the hot-box was, because I remember the car; it was one of the low cars and——
Q. What side of the engine was he lying on?
A. Well, we were going east, and yes—on our right he was lying.
Q. Counting tracks north and south, he was on the west side?
A. Yes, sir.
Q. And that would bring him on the east side of the train?
A. Yes, sir.
Q. On the main track?
A. Yes, sir.
Q. Did you pass between the engine and the train? That is, the engine on the siding and the train on the main track?
A. Yes, I walked back there to get something out of the caboose.
Q. Did you notice how much clearance there was between
207 the engine and the train?
A. Why, I noticed it was kind of close, but I couldn't tell you just exactly how far it was.

Q. How much space was there, that is, about how much, what is your recollection about how much space there was between the engine and the train there?

A. Well, I couldn't just say, but it was not very wide between the engine and the train. It was not as wide as it is in some places.

Q. Did you notice the condition of the ground at the point where he lay?

A. Yes, sir; the ground was kind of rough and uneven; where he lay it was kind of smooth, but just a little bit on, a little south of where he lay, it was rough.

Q. What was it made it rough?

A. The flood; it had never been filled in.

Q. Was there any filling in at all, at that time?

A. I could not say as it had ever been filled in there. The switch track had been filled in, but as to the siding I could not say whether that had been filled in or not.

Q. Did you notice what the ground—what was the surface of the ground?

A. Well, now, I could not say just exactly what that was, whether it was ashes or slag or what it was.

Q. What was Wilson's apparent condition when you got back there to him—what did you notice about him?

A. I noticed that he was suffering intense pain, and we tried to move him, and we couldn't move a hand to move him any place or he just hollered something awful, and I got a doctor
208 as soon as I could, and he gave him two hypodermic injections in the arm, kind of killed the pain. We got the cushions out of the caboose and put them under his head, and got him on a wide board.

Q. Did Wilson make any intelligible statement at that time?

A. No, sir. I don't think he did; he seemed to be kind of delerious, but didn't know what had happened.

Q. Had you been running an engine over that track where this accident happened, over the main track, for some time previous?

A. Since the flood, yes, sir.

Q. How often?

A. I suppose I was over there every day or two any way.

Q. Has there been any change made, to your knowledge, between the time Wilson was hurt and the present time, that is, in reference to distance between the siding there and the main track?

A. Not to my knowledge, no, sir.

Q. If there had been, you would have observed it, wouldn't you?

A. Well, I might, and I might not. I couldn't say whether I would or not. On a siding like that, the section men—you would see them working—they might have moved it a few inches, I could not tell, just for that.

Cross-examination by Mr. Clark:

Q. Mr. Briggs, you said that you went back there and
209 helped put Mr. Wilson in the car?

A. Yes, sir.

Q. Are you able now to fix the location with reference to the tracks in any way, so that you can tell us where that was?
A. Well, about twelve or fifteen car lengths, something like that.
Q. From where?
A. From the switch down there, the frog, as near as I can get to it.
Q. Twelve to fifteen car lengths south, or east, as you term it?
A. Yes.
Q. From the main line switch frog?
A. Yes, sir.
Q. And he lay between the main track and the passing siding?
A. Yes, sir.
Q. You stated, I think, that he lay just in front of the engine?
A. Same as the engine is here, he lay right here (illustrating), just a little bit in front of it.
Q. So that if he had been riding on the rear foot board, it would mean that the engine he was riding on had just about or a little more than passed by him, if the engine were backing?
A. His engine was backing when he dropped off.
Q. It seems he was riding on the foot-board?
A. Yes, just as the engine went by him.
Q. Yes?
A. As the engine went by him, yes, sir.
Q. Do you know whether the track is straight or curved
210 there?
A. If I remember exactly right he lay very near on that curve, or just a litle east of it. There is a curve just the other side, a curve going that way (indicating).
Q. He lay right on that curve?
A. Yes, or a little bit east.
Q. South?
A. Yes, south.
Mr. Ives: Just a moment: Is that south of the middle of the curve or south of the end of the curve?
The Witness: Oh, of the end of the curve?

Mr. Clark:

Q. You never had any occasion to measure or have any one measure the distance between the centers of the siding and the main track there?
A. No, sir.
Q. You did not?
A. I don't know anything at all about it.
Q. You don't know what the measurements there are, then?
A. No, sir.
Q. And you don't know positively whether there have been any changes made in the location of the side track?
A. No, sir, I do not.
Q. Now, as to what it was then?
A. No, sir, I do not; I couldn't say positively.
Q. But you say that the section men in their work might have

changed it a few inches, and your attention would not be called to that?

A. No, sir, it would not.

211 Q. Do you know what kind of a step or footboard this engine had on it that Wilson was said to be riding, what kind that was?

A. I couldn't tell just what kind it was, no, sir.

Q. You don't know whether it was a long footboard or whether it was a step?

A. No, sir.

Q. Do you know whether it was on the side or on the end of the tank?

A. I could not say positively.

Q. Were you able to determine from anything that you saw there on the ground, what caused Mr. Wilson to fall, if he fell?

A. No, sir, I couldn't; only just——

Redirect examination by Mr. Ives:

Q. Did you know Wilson before that night?

A. I saw him once before that where I was once. I had seen him different times in Newcastle, but I only saw him once here in Peninsula. This is the only time I had ever worked with him.

Q. You haven't seen him since?

A. I haven't seen him since, no, sir. I thought he was all in."

212 Mr. Ives: The doctor who took the X-Ray pictures is here now, and I would like to call him now.

213 Louis Thexton, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Ives:

Q. State your name, please.

A. Louis Thexton.

Q. And your business is what?

A. Surgeon.

Q. Where is your place of business?

A. 1940 Park avenue.

Q. Do you know the plaintiff in this case, Mr. Wilson?

A. Yes, sir.

Q. Have you with you certain plates, certain X-Ray plates there?

A. Yes, sir.

Q. And do you know of your own knowledge of whom those plates were taken?

A. These are pictures of the patient sitting in the chair.

Q. You were present at the time?

A. Yes, sir.

Q. Do you know whether they are accurate representations of the conditions which they show?

A. I do.

Mr. Ives: I offer the two plates. One is a plate of the back and the other of the shoulder, the right or left shoulder; I offer those in evidence.

214 Mr. Sheean: No objection.

(The plates referred to were admitted in evidence, and marked Plaintiff's Exhibits — and —, respectively.)

Mr. Ives:

Q. Now, take the picture in reference to the back, doctor. What does it show in regard to the condition of the vertebra, of the spine?

A. The picture of the back, which extends from the pelvic bone, which is this bone that we sit on,—these are the two pelvic bones in the sides, and this in the center is the picture of the spine. This is the last vertebra, or bone of the spine before it connects with the bones of the pelvis. From here, where my finger is, to there, (indicating), is the first bone, counting from the pelvis upwards. That is called the last lumbar vertebra. These are the vertebra. From there to there is the second lumbar vertebra, which shows, and in between these the dark line is made by the cartillage. These are bones. From here to here, is about the position of the third lumbar vertebra. There are five. This would be the fifth, this is the fourth, this is the third. We count from above downward, but I am counting from below upward. This one does not show the top of it, and it is bulged out this way, begins to turn; that is, the spine is not straight, showing that this bone has been broken. Here

215 there is no cartillage, showing that the bone and the one above it, which is the second lumbar, have become partially grown together, but not entirely. It does not show it entirely, because here is a small shadow on this side. This is the third, this is the second, but I cannot tell from this picture where the third leaves off and the second begins. Those apparently are grown together entirely. This, if it came up straight, would come here. Here is the side of it, and here is the other side, so it is deviated to the left side about an inch and a half, the spine. This one, the third and the second, are grown together, and the last dorsal vertebra, of which there are twelve, and to which the last rib is attached, is also broken. Above that it shows the vertebra clear. So that the last dorsal vertebra, or the twelfth, the first lumbar, the second lumbar, and the third lumbar are broken, and the cartillage between them, which allows of the motion backward and forward and sideways, has practically been obliterated and it has become bony from there down,—no joints—practically none.

Q. How many vertebra are affected altogether, doctor?

A. Four vertebræ.

Q. Now, what does the other picture show?

A. This is a picture of the shoulder. This way is up,

216 so that you can see these passing out are the ribs, passing out from the center of the outside. This is just the top of the arm bone. Here is the shoulder joint. This is what is called the collar bone or the clavicle, passing out from this, which is the

sternum, to the tip of the shoulder. Where I have my finger is the tip of the shoulder. This bone, the clavicle, should go from here into here, which is the point of the first rib. That is the top of this bone here, which we call the breast bone or sternum. It is moved down to about the third rib. There was therefore a dislocation of this clavicle or collarbone. Then it was brokne here. Here is the outer fragment, and here is the inner fragment. The outer fragment is about two and one-half inches long. It is below the inner fragment, and the two of them are grown together in this way (illustrating), one riding above the other like that, over-lapping about an inch and a quarter. Here is one end of this and here is the other end of the other one. The outer end of this one and the inner end of this, so that they are one above the other. The inner end is dislocated and these are united *viciously*; that is, they are not united end to end. They ride over each other.

Q. How long ago were those pictures taken, doctor?

A. This writing is so vicious I can't tell.

Q. About how long?

A. This March 14th, I think.

Q. You mean May, do you not?

217 A. "M-a"—well, it may be a "y". I guess it is a "y", May 14th. It looked like an "r" to me.

Mr. Ives: That is all.

Cross-examination by Mr. Sheean:

Q. Doctor, are those all the pictures you took of this bone?

A. No, there were some other pictures taken of this bone, but some of the others were not good plates and some of them are simply duplicates of these.

Q. What do you mean by "not good plates"?

A. They are fogged, do not show the bones clearly.

Q. There were some other pictures taken of the spine?

A. Yes, I think there is one other picture of the spine but that does not show it very distinctly.

Q. Do they show any line of cartillage, any of the other pictures?

A. No, it does not.

Q. How many other pictures of the spine did you take?

A. I think there was only one other.

Q. Taken in the same way?

A. No, I believe there are two others.

Q. You have those here, have you, doctor?

A. Yes, I have the others. I think one is a small one.

Q. I wish you would produce those.

A. That one is a duplicate of the other. That is also a

218 duplicate. That is the one that is fogged down below from the ribs. You see this.

Q. You have none then, doctor, taken in a different position of the patient, that is, one taken through a different part of the body, from a different angle of the spine?

A. No. This is a small one of the same place, and shows about the same.

Q. Taken in the same direction?

A. Yes, this is just the same, only it is on a small plate. It don't show anything above or below the line of fracture.

Q. Now, besides the picture of the spine and clavicle, did you take any other picture of any other part of the body?

A. Yes, there is a picture of the head.

Q. And what does that show?

A. This is the picture of the head.

Q. What does that show, if anything?

A. This does now show anything out of the ordinary.

Q. A perfectly normal head?

A. Well, this is a perfectly normal picture. It does not show down to the neck. It is a small plate, but up through here it doesn't show anything.

Q. But in the head there is no evidence of any skull fracture?

A. Nothing that I could see, no, sir.

Mr. Sheean: That is all.

219 Counsel for plaintiff offered in evidence and read to the jury the deposition of Hiram Cearfoss, said deposition being in words and figures following, to-wit:

HIRAM CEARFOSS, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Ives:

Q. State your name, please?

A. Hiram Cearfoss.

Q. Where do you live Mr. Cearfoss?

A. Beaver Falls, Pennsylvania.

Q. What is your business?

A. Railroad brakeman.

Q. For what company?

A. B. & O.

Q. How long have you been with that Company?

A. Two years on the 21st of August.

Q. How long have you been railroading?

A. Oh, about nine or ten years.

Q. You know J. B. Wilson, the plaintiff in this case?

A. Yes, sir.

Q. How long have you known him?

A. Oh, about two years, nearly all the time I have been here. That is, I know him to see him and talk to him. He is along my line of work.

220 Q. You were brakeman on his train, were you, too?

A. Yes, sir.

Q. —On the night that he was injured?

A. Yes, sir.

Q. About what time of night was it?

A. Well, I don't know myself; it was between one and three o'clock,—I never looked at my watch.

Q. He was hurt in Peninsula.

A. Yes, sir.

Q. The last trip that you took before that was a trip where you—that is, he as conductor and you as brakeman, and other members of the crew, took a train out of Peninsula?

A. Yes, sir.

Q. To Warwick, Ohio?

A. That is, after we left Newcastle, yes.

Q. Have you any recollection what time you were relieved in Warwick?

A. Oh, along between eight and nine o'clock in the morning.

Q. Have you examined your records in regard to that?

A. I have seen the time, 8:50, we were relieved.

Q. Do you remember making a record of that time?

A. No, I do not.

Q. You don't remember independent of your record?

A. Why, I kept my time, but I don't keep it in my mind. I never kept the records.

Q. What I am trying to get at is this: Independently of
221 the 8:50 in the record, if you hadn't examined such a record, would you have any memory as to what time it was?

A. Yes, I would know just about what time. I don't know as I would just remember the minutes, or anything like that. I would know about the time I was relieved.

Q. Have you any recollection as to whether or not the crew that relieved you were late in getting into Warwick that morning?

A. No, indeed I don't.

Q. What time did you get into Cleveland that day, the 22nd of August?

A. 5:10.

Q. About what time did you get out of the yard there?

A. About 12:30.

Q. No, I don't mean at the time you took the trip going towards Peninsula, but I mean when you got into the yard at 5:10, how long was it before you got out of the yard?

A. We were called for 12:01.

Q. Who was with you, your crew at that time?

A. Who?

Q. At 12:01?

A. Who do you mean?

Q. That is Wilson and yourself, and who else?

A. Van Winkle, I guess,—he was the head man.

Q. You were called for 12:01?

A. Yes.

Q. What time were you called for 12:01?

A. I couldn't say, because I was sleeping at the time we were called: the conductor woke me up.

222 Q. On this morning?

A. Yes, sir.

Q. That is, Wilson?
A. Yes, sir.
Q. And where were you—that is, what part of the train were you on at the time Wilson was hurt?
A. I was out flagging at the time Wilson was hurt.
Q. The rear end of the train?
A. Yes, sir.
Q. There was a hot-box here at Peninsula, wasn't there?
A. Yes, sir.
Q. Do you remember in what part of the train that car was?
A. It was either the seventh or the eigth car, I am not positive which.
Q. From the caboose?
A. From the caboose,—but I think the seventh car.
Q. When you came into Peninsula where did the rear end of your train stop?
A. Well, they stopped with the rear end of the train along about two car lengths this side of the frog, to clear the passing siding.
Q. Was Wilson back there at the time?
A. Yes, sir.
Q. You mean by that, that the rear end of the caboose was about two car lengths from the frog?
A. Yes, sir.
Q. And the frog you mean was the frog in the siding, on the east side of the track?
A. Yes.
Q. Do you know what Wilson did then?
A. No, I don't.
Q. What was the next thing you heard?
223 A. Well, I heard the engine doing back and stopping.
Q. Going back and stopping?
A. Yes, sir.
Q. Then what did you do?
A. Then the next thing the head man come back to me, and I saw him coming and stepped to meet him, because his lantern looked as if he was in a hurry. I will just tell you word for word what he said to me. He asked me if I was a hard hearted man. I said: "Why, what's the matter?" He said: "Wilson is up there, all cut up."
Q. What did you do then?
A. I went to him.
Q. Where did you find him?
A. Found him lying in between the two tracks.
Q. That is, the main track and the siding?
A. The main track and the siding, yes. I got down and tied him up.
Q. And there was an engine there?
A. Yes, by him; the engine was by him.
Q. The engine was on the siding?
A. On the siding.

Q. You say it was by him; do you mean it was to the north of him?

A. Towards Cleveland.

Q. Towards Cleveland; and how far did he lie from the pilot?

A. About half the length of the engine.

Q. South of the pilot?

A. Yes, sir.

Q. Where was he from the car with the hot box in it, south or north?

A. No, I don't know.

224 Q. Well, towards Cleveland is north, isn't it?

A. I think so.

Q. Yes.

A. Well, I don't know, because I never looked any more at the hot box.

Q. Did you notice the condition of the *main* there where he lay, between this main track and the side track?

A. Yes.

Q. What was the condition of the ground there?

A. Rough, very uneven; the slag was there in hills and hollows, as near as I can explain it to you; in piles.

Q. Did you notice the distance between the east rail of the main track there and the west rail of the siding?

A. I didn't pay any attention to the rails, but I noticed between the cars was close; I had occasion to walk backward and forward there several times between——

Q. Between the cars?

A. Between the cars; they were close.

Q. What cars do you refer to?

A. Our caboose and the rear of the train.

Q. Was your caboose on the siding?

A. Yes, I pulled the caboose out to take Wilson to Akron in.

Q. When you went down to where Wilson was lying, did you pass between the engine that was standing on the siding there and your train?

A. Yes, sir.

Q. Did you notice what distance there was between them

225 there?

A. Just this way (indicating), so that I turned my shoulders this way (indicating sideways) when I started to walk in between.

Q. That is, you turned your shoulders sideways?

A. Yes, sir, to clear, so that I would not tear my clothes on anything sticking out on either the car or the engine.

Q. And as you walked you would strike on either the engine or the car——

A. Yes, sir.

Q. —or anything else?

A. No, you would not strike on anything else, but you would probably hit one or the other in the motion of your walk.

Q. Could you see about how far the engine was from the car when it stopped opposite the train in feet or inches?

A. Well, no, I couldn't. You could guess at it, that would be all I could do, and it was after night, at that. It was somewhere between two feet or over, probably.

Q. Do you know the width of your shoulders, Mr. Cearfoss?

A. No, I do not.

Q. What is your weight?

A. Oh, about 165 pounds.

Q. And what is your height?

A. Five feet nine and a half inches; I wear a 41 coat.

Q. Did you notice any marks of any kind in the ground at or near the place where Wilson was lying, opposite him?

A. Well, yes, I saw where he had torn up the sod, getting off or rolling or whatever made the marks there, you know. I
226 don't know what caused it. Then they had been doing a lot of tramping round before I got up there. There was three or four men there when I got there.

Q. Were you there with Williams, the conductor,—do you remember that?

A. I believe I was.

Q. Did you notice any marks on the rail?

A. Yes, I noticed blood on the rail.

Q. Do you remember pointing out there marks to Williams?

A. I remember looking at those marks with some one, but I don't remember just who it was. I don't remember whether it was the engineer and I or Williams and I that were standing there, where the blood was on the rail.

"Cross-examination by Mr. Clark:

Q. This time that you speak of seeing the blood on the tracks was that same morning?

A. Yes, sir.

Q. And after you got back from Akron?

A. Yes, sir.

Q. And you showed Williams then?

Q. I wouldn't say sure it was Williams.

Q. Well, you showed somebody?

A. That I was with there, yes, sir, some one of the train crew; I don't recall who it was.

Q. And that corresponds with the same place that you——

A. It was the same place, because whoever it was we walked
227 back in daylight to see where he had been run over.

Q. I wanted to fix the location. You say your train came about how far south past the switch or the frog?

A. I judge in the neighborhood of one or two cars to clear, to clear the passing siding, to let any other train out by us.

Q. That would mean about how far from the frog, that is, this main line switch track?

A. Oh, as far as from here across the street.

Q. About how far would you say that would be in feet, Mr. Cearfoss, from here across the street?

A. About 70 feet.

Q. Or suppose we were to put that in rail lengths,—what is the length of the rail, ordinarily?

A. I think thirty feet.

Q. And putting it in rail lengths, how far would you say the distance would be?

A. Well, a car will measure about 36 or 38 feet, some of them, some forty feet, and two cars would be about 80 feet. Those were hopper cars and they are about 34 feet.

Q. Can you give us, to help us out, the number of rail lengths from the frog to the point where you saw the blood on the rail,—can you give us an idea of that?

A. No, I could not.

228 Q. How many rail lengths it would be?

A. No, I could not.

Q. But in car lengths it would be about what,—those hopper cars that you have mentioned?

A. Probably nine or ten.

Q. From the frog?

A. From the frog, yes.

Q. It might be more?

A. It may be,—I wouldn't say sure, because I could not——

Q. I don't remember whether you stated in your direct examination whether you knew about the hot box?

Mr. Ives: He did, but he said he didn't pay any attention to the hot box after that.

Mr. Clark: Well, I won't ask you about that. You spoke about the space between the main track and the siding there being filled with slag.

A. Yes.

Q. Now, will you tell us what that was, so that we will get a little better idea about what that was, as to its coarseness or fineness?

A. Well, it was fine slag, granulated slag.

Q. Granulated?

A. Yes."

229 July 3, 1914, 2 P. M.

Court met pursuant to recess.

Present: As before.

Mr. Ives: I desire to recall the plaintiff to ask a question.

JAMES WILSON, the plaintiff in the above entitled case, having been previously sworn, resumed the stand for further examination.

Direct examination by Mr. Ives:

Q. Mr. Wilson, do you remember the time that you reached Newcastle Junction on the 21st day of August; that is, preliminary to your making your trip to Warwick?

A. Between the hours of nine and ten.
Q. No, but I mean preliminary to taking that trip, what time you got down to take that trip that afternoon, the trip to Warwick?
A. The trip to Warwick?
Q. Yes, to Warwick?
A. 4:25.
Q. And how much time elapsed from the time you arrived at the depot there at 4:25 before you went to the roundhouse?
A. I went directly to the roundhouse.
Q. And how far was the roundhouse away?
A. About two city lots.
Q. How long would it take to go there?
230 A. Well, it would take ten minutes to walk over there.
Q. Is that the first work you did, at the roundhouse?
A. The first work, I went to the roundhouse.
Q. Now, when you were on the footboard, just before the accident happened do you remember which way you stepped when you went off that footboard?
A. I stepped between the engine and the train.
Q. What direction?
A. West.

Mr. Ives: That is all.

Cross-examination by — Sheean:

Q. Mr. Wilson, that afternoon when you came down to the Junction at 4:25 was the arriving time of the train you came down on, was it?
A. Yes, sir.
Q. And was that a train running simply between Newcastle and Newcastle Junction?
A. Yes, sir.
Q. Just one coach and an engine?
A. No, it had two coaches.
Q. Two coaches?
A. Yes, sir.
Q. What is the diatance between Newcastle and Newcastle Junction?
A. Three miles.
Q. Three miles. And when you say 4:25, you are simply speaking of the arrival of—time of that train, the time it was due to arrive at Newcastle Junction?
A. That is the time I got there, 4:25.
Q. What is that?
231 A. That was the time I got there, 4:25.
Q. You looked at your watch, then, did you, that day?
A. Yes, sir, at the time the train was due there; it was right on time.
Q. Right on time?
A. Yes, sir.
Q. Now you went directly from there to the roundhouse?

A. Yes, sir.
Q. And at the roundhouse what did you do first?
A. Asked the call boy where the train was that we got off on.
Q. Yes.
A. And I found out who the crew was that would get out there.
Q. Learned that from the call boy?
A. Yes, sir.
Q. At the roundhouse?
A. Yes, sir.
Q. And then what next did you do?
A. I got a time slip off of him, and got him to sign it.
Q. A blank time slip?
A. Yes, sir.
Q. And that was the time slip that I showed you here yesterday that you filled out?
A. Yes, sir.
Q. Was called to leave at 5:30?
A. Yes, sir.
Q. Now, what next did you do?
A. I went to the yard office.
Q. From the roundhouse to the yard office is how far?
A. About a city block; just about halfway between the telegraph office and the roundhouse.

Q. About a city block. And then at the yard office, what
232 did you do there?

A. I got the bills for the train and the wheel report.
Q. The bills of the train, and what?
A. And the wheel report.
Q. Now about how long after you got to the roundhouse was it before you got to the yard office, before you received your bills?
A. Well, I wouldn't know that; I couldn't tell exactly how long it was.
Q. Ten or fifteen minutes?
A. Something like that, perhaps.
Q. So that if it took you ten minutes to get to the roundhouse, and ten or fifteen minutes from the roundhouse before you got your bills, it would be something in the neighborhood of five o'clock when you first got your bills?
A. Well, it would be pretty near five.
Q. Just about somewhere in that general neighborhood?
A. Somewhere around there.
Q. It was at the yard office that you would get the bills as to what train you were to take out?
A. Yes, sir.
Q. And the first place that you would have any knowledge as to what bills there were in your—what cars there were to be on your train?
A. The first place.
Q. At the yard office?
A. Yes, sir.
Q. So that the first knowledge that you got as to just what cars

would be in your train was somewhere in the neighborhood
233 of 5 o'clock that day?

A. That is about the time I got the bills, somewhere along about five.

Q. When you speak of stepping between the engine and the train, Mr. Wilson, just before you were hurt, you have no recollection of actually getting to the ground there?

A. No, I havn't.

Q. Or either foot touching the ground?

A. No, sir.

Q. Have you any recollection as to whether either hand was on a hand-hold in the neighborhood of the footboard at the time that you began to step down?

A. My right hand would be on the hand-hold.

Q. On the hand-hold?

A. Yes, sir.

Q. Then your lantern was in your left hand?

A. I don't know.

Q. You don't know as to that?

A. Whether it was in my left hand, or might have been on my right arm, I couldn't tell.

Mr. Sheean: That is all.

Mr. Ives: That is all.

The Court:

Q. You have spoken at different times in your testimony about your reporting for duty. When you reported for duty at this Newcastle Junction yard there to take a train out from Newcastle
234 Junction, to whom did you—to what person did you report for duty?

A. The yardmaster and the callboy both.

Q. Did you report to both of them on the same trip?

A. Yes, sir.

Q. Report for duty?

A. I will have to get the time slip off the callboy and I will have to get the bills off the yardmaster, so it would be reporting to both.

Q. You have given on different occasions the time at which you reported for duty. Was that the time you reported to the callboy or the time you reported to the yardmaster?

A. When I would go to the roundhouse and report to the callboy first, it would be a report to the callboy; sometimes I would go to the yard office first, but not always.

Mr. Sheean:

Q. Well, Mr. Wilson, going to the callboy was simply to get time slip, a blank from him, wasn't it?

A. And find out who the crew was.

Q. Finding out who your crew was a part of the work of making out your time slip?

A. Yes, and then if you didn't go to the callboy and he didn't see

you, he would be liable to call somebody else if you didn't show up there before the time was to leave.

Q. And after getting that slip from him, then usually, or at least on this particular afternoon, you would go to the yard office?

A. Yes, sir.

Q. And there get your bills?

A. Yes, sir.

235 Q. Was there any registering done there at the yard office?

A. Not at the yard office. There was registering done at the telegraph office.

Q. At what?

A. At the telegraph office.

Q. And that was just before this train went out?

A. That was at the time that I went from the yard office to the telegraph office.

Q. That was after getting your bills?

A. Yes, sir.

Q. So that the time that you would register would be after you had gotten your bills and were then ready to check your train?

A. Then ready to get the orders.

Q. Or get your orders, yes.

A. Yes, sir.

Q. Well, of course, until you got the bills you couldn't do any checking of the train?

A. No, sir.

Q. Or anything about the train at all until after you got these bills at the yardmaster's office?

A. Well, I had to see if the engine would be out on time, and if it wasn't on time I would have to report it.

Q. Well, I mean this particular afternoon. I think you said you did between 5:30 and 6:30—you didn't actually get out until 6:30?

A. No, sir.

Q. But between 4:25 and 5—between the 4:25 when you arrived you first went over to the roundhouse and you got a slip there

236 and filled out the slip?

A. Yes, sir.

Q. Then went to the yard office, and got the bills at the yard office. Now on that particular afternoon you didn't get your bills until 5 o'clock?

A. About 5

Mr. Sheean: That is all.

Mr. Ives: That is all.

237 Whereupon the plaintiff rested his case.

Thereupon, at the close of plaintiff's case, the defendant moved the court in writing to instruct the jury to find the defendant not guilty, which said motion was in the words and figures following, to-wit:

"Comes now the defendant in the above-entitled cause, by Calhoun, Lyford & Sheean, its attorneys, at the close of all the evidence offered on behalf of the plaintiff, and moves the court to give to the jury a written instruction in the following form:

" 'The cou[illegible]tructs the jury to find the defendant not guilty.' "
But the court denied and overruled said motion. To which action of the court in so denying and overruling said motion, the defendant, by its counsel, then and there duly excepted.

And with the aforesaid motion, the defendant tendered to the court a written instruction reading:

"The court instructs the jury to find the defendant not guilty," and requested the court to mark said instruction "Given" and read the same to the jury. But the court refused to give said instruction, and refused to mark said instruction, "Given", but on the
238 contrary marked said instruction "Refused."

To which action of the court in so refusing to give said instruction and in so marking said instruction "Refused," the defendant, by its counsel, then and there duly excepted.

239 Whereupon, the defendant, to maintain the issue in its behalf, introduced the following evidence and the following proceedings were had:

OTTO C. SPIETH, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Clark:

Q. State your name?
A. Otto C. Spieth.
Q. You- resident?
A. Cleveland, Ohio.
Q. Your occupation?
A. Assisstant division engineer of the B. & O. Railroad.
Q. For what division?
A. Cleveland division.
Q. How long have you been such assistant division engineer?
A. Since April 1911.
Q. I will ask you whether you are familiar, or how familiar you are with the tracks that extend through the town of Peninsula—do you know those tracks?
A. I do.
Q. How long have you known those tracks?
A. About three years.
Q. Please look at the plat or map which I now show you and state what same is.
240 A. The map is a map showing the tracks and buildings, Peninsula, Ohio, of the B. &. O. Railroad, Cleveland division.
Q. From what was that map made?
A. From actual measurements in the field made by myself.
Q. When were those measurements taken?
A. They were taken on June the 13th.
Q. This year?
A. This year.
Q. Has there been any change in the condition of the tracks between August 1913, say August 23rd, 191[illegible], and the time you made that plat?

A. Not to my knowledge.
Q. Does that plat correctly indicate the location of the tracks?
A. It does.
Q. As you found them. Mr. Ives has a copy.

The Court: Anything further with him?

Mr. Sheean: Just a minute, your honor. We have something here that I think will be technically objectionable, unless it is thought desirable to have it as a matter of convenient reference.

Mr. Clark: We offer the blue print in evidence and ask that it be marked Defendant's Exhibit 1. Whereupon said document was received in evidence by the court, marked Defendant's Exhibit 1, and is in words and figures following, to wit:

(Here follows map marked p. 241.)

MAPS

TOO

LARGE

FOR

FILMING

242 Mr. Clark: That is all.

Cross examination by Mr. Ives:

Q. Did you make these measurements?
A. Yes, sir.
Q. And who was with you at the time?
A. A young man by the name of Spieth.
Q. How did you make them?
A. With a steel tape.
Q. And between what distances did you make them?
A. I made them from the west switch of the—where the west switch of the passing siding enters the main track to the public street; in fact, all the way down to the main street of the town.
Q. Did you make any measurements about 14 rail lengths south of the frog, at the frog of the switch at the north end of the siding?
A. I did.
Q. Do you know what that measures at that point?
A. Yes, sir, I do.
Q. What?
A. I have a memorandum showing that.
Q. At the south end of the 14th rail from the frog what does it measure?
A. From the frog, the distance from *guage* line to *guage* line is seven feet and eight hundredths.

The Court:

Q. Well, now, just wait a minute. What do you mean from *guage* line to *guage* line?
243 A. The inner face of the rail is the *guage* line of the track.

Mr. Ives: I didn't understand that.
Mr. Sheean: The inner face.

A. The inner face of the rail is the *guage* line.

Mr. Ives:

Q. You mean the face——
A. The inner face which holds the flange of the wheel.
Q. On both tracks?
A. On both tracks.
Q. So that you got from these measurements the width of both rails?
A. The width of both rails.
Q. What is the width of the top rail?
A. Those rails at that point are worn, and it is an average of 2¼ to 2½ inches.

Mr. Ives: That is all.
Mr. Clerk: That is all, Mr. Spieth.

JOHN R. VAN WINKLE, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Clark:

Q. Speak loud enough so the farthest gentleman over there will have no trouble hearing you. What is your name?
A. John R. Van Winkle.
Q. And your residence?
A. 3114 Frederick Street, North Side, Pittsburg.
244 Q. What is your present occupation?
A. Painter.
Q. Did you at any time work for the Baltimore & Ohio?
A. No, sir.
Q. For the Baltimore & Ohio Railroad?
A. No, sir.
Q. Did you at any time work for the Baltimore & Ohio Railroad?
A. Only when I worked here this last time, braking.
Q. Yes, that is what I mean.
A. That is the only time, yes.
Q. When you worked for the railroad company it was in what capacity?
A. Sir?
Q. In what capacity did you work for the railroad company?
A. I don't quite understand you, Judge.
Q. How were you employed when you worked for the railroad company?
A. Why, I was coming up through the yard——

The Court:

Q. What did you do?
A. Oh, braking.

Mr. Clerk:

Q. You were braking?
A. Yes.
Q. Do you know the plaintiff, Mr. James B. Wilson, in this case, the gentleman sitting here (indicating)?
A. Yes, sir.
Q. Do you recall whether or not you were a brakeman on a train of which he was in charge on a trip wherein he received injuries?
A. Yes, sir.
245 Q. What were you on that train, head brakeman or rear brakeman?
A. Head brakeman.
Q. And your duty called that would be where on the train?
A. Either ride the cars or ride the engine.
Q. Do you recall the time that Mr. Wilson was injured?
A. What time of the day or morning?
Q. Yes, and the place?
A. Why, I think it was about 2 o'clock, or between 2 and 3, in Peninsula.

Q. Peninsula?
A. Yes, Peninsula.
Q. Ohio. Do you remember having heard or knowing of anything of a hot box on that train?
A. Yes, sir.
Q. Tell us about that.
A. We were coming up towards Peninsula, and we stopped there to take water on our way coming up there, and we noticed on the righthand side, I am pretty sure, there was a hot box——
Q. Don't speak quite so fast, if you can. All right, go ahead.
A. So Mr. Wilson told me to cut off the engine to take water, and he told me after taking the water to go down the sidetrack and cut off six cars from the caboose, and set off the hot box on the third track; that was on the second spur from the main track.
Q. As your train came in there the engines were headed in what direction?
A. Headed east.
Q. Headed east?
A. Yes, sir.
246 Q. Towards what city, Akron?
A. Yes.
Q. And where was the hot box that you saw?
A. Why, if I am not mistaken, it was on the righthand side on the head truck.
Q. And about what car in the train, if you know?
A. Six cars from the caboose.
Q. Six cars from the caboose. Who was present when Mr. Wilson told you what to do with reference to that hot box car?
A. Why, I think it was Mr. Miller and the brakeman and myself and Mr. Wilson.
Q. Now, have you given the conversation with reference to what he instructed you to do, as you recall it.
A. Yes, sir.
Q. What did you do then?
A. After I took the water he told me to go down on the siding and to cut off the six cars from the caboose, hook on to the caboose and pull it down and throw it in on a siding, then come back and hook the train on the engine again, then run up the center track and hook on to the train.
Q. That is what he told you to do?
A. Yes.
Q. Now, I am asking you what you did do?
A. Well, just exactly as I told you, Judge.
Q. You did that?
A. Yes, well, furthermore, we didn't get down to cut off the caboose.
Q. What is that?
A. We didn't get down to cut off the caboose. He was
247 hurt before we went down to couple on.
Q. Who cut off the engine?
A. Why, I cut off the second engine, as I know of.

Q. Then when the engine backed south did you go with the engine—I mean from the north, or west you would call it.

A. To go down to cut off the cars, you mean?

Q. Yes, after the engine was cut off and run back on the siding, did you ride on the engine?

A. I rode down on the hind end of the engine, the tender, me and Mr. Wilson.

Q. You and Mr. Wilson?

A. Yes, sir.

Q. Which side of the tender were you on?

A. On the outside.

Q. Would that be the side next to the main track?

A. No, the opposite side?

Q. Where did Mr. Wilson ride?

A. Mr. Wilson stood on the other side of the tender, on the tender towards the main track.

Q. As you went down along that siding there did you have any conversation with Mr. Wilson or he with you?

A. No, sir.

Q. Now, tell us the next thing. Did Mr. Wilson say anything to you about going to step off at any time?

A. No, Mr. Wilson didn't say anything to me about stepping off. I didn't know that the man stepped off till I heard the bump.

248 Q. Till you heard what?

A. Till I heard the lantern or him bumping against the car. At least I thought it was him bumping there.

Q. You heard a noise?

A. Yes.

Q. You said something about the lantern in that connection?

A. I heard the lantern first. It probably was the lantern that I heard, because I *see* the lantern is all bent in the morning.

Q. Did Mr. Wilson—did you see him give any signal to the engineer?

A. No, sir.

Q. Did you give any signal to the engineer?

A. Gave a signal before I started down the sidetrack to back up, to start down to do our work.

Q. Did Mr. Wilson at any time in connection with that taking out that hot box, or preliminary to taking that out say "I am going to get off with the hot box, cut the box off here behind the hot box"?

A. No, not to me, no, Judge.

Q. You had no conversation?

A. No, sir.

Q. You held no conversation of that sort?

A. No, sir.

Q. How fast was that engine going?

A. Well, I am not a very good judge of speed, Judge. I would judge about—it may be going eight or ten and probably twelve miles an hour.

Q. Now as the engine was going north, Mr. Wilson and yourself were on the footboard.

A. Yes, sir.

249 Q. Tell the jury whether the engine was going ahead or backing up?

A. The engine was backing up.

Q. At the time Mr. Wilson had left the engine?

A. I couldn't say whether he fell off or whether he jumped off. I didn't notice him till I heard the noise of a bump that way, so then after the engine stopped I stepped out at the back to see what the trouble was, and my engineer told me, he said——

The Court: Don't tell that.

Mr. Clark: Never mind what the engineer told you. That is all, you can cross examine.

Cross-examination by Mr. Ives:

Q. How long did you work for the B. & O., Mr. Van Winkle?

A. Why, I judge about three weeks, or a little better.

Q. How long had you been working for them when this accident happened?

A. Why, close on to three weeks.

Q. How long did you work afterwards?

A. I made one trip after that.

Q. You hadn't worked for them before?

A. No, sir.

Q. Had you ever done any railroad work before then?

A. On the Penhandle—Pennsylvania.

Q. Have you worked on the Panhandle since?

A. No, sir.

Q. Have you done any railroad work since then?

A. No, sir.

Q. Where have you lived since the time of this accident?

250 A. Right at the address I give here, 3114 Frederick Street, north side.

Q. And you are in the painting business?

A. Yes, sir.

Q. What was your business before that time?

A. Electric craneman.

Q. Electric craneman?

A. Yes, sir.

Q. Have you ever been an actor?

A. Sir?

Q. Have you been an actor?

A. Why, in these Nickelodions, and one thing or another, I have done a performance.

Q. How long were you an actor?

A. Oh, about two years, I suppose.

Q. And on the night of the accident, do you remember having any conversation with Mr. Wilson before you reached Peninsula?

A. Only when I was taking out the engine.

Q. Where, at Cleveland?

A. At Cleveland, yes, sir.
Q. When you got to Peninsula, what was the first thing you did?
A. When I got to Peninsula?
Q. Yes?
A. He came in to tell us about the hot box. First he told me to cut off the engine to take water.
Q. What was the first thing you did when you reached Peninsula?
A. When the enginer told me to take water, to cut off the engine.
Q. Did you cut off the engine?
A. The hind engine, as I know of.
251 Q. Did you cut off the engine for the purpose of taking water?
A. Yes, sir.
Q. Which engine did you cut off?
A. The hind engine.
Q. Did the head engine take water?
A. Yes, sir.
Q. While you were taking water with the hind engine Mr. Wilson came up there?
A. I don't know exactly whether he came right up there at the time when it was taking water, or beforehand.
Q. And after he came there did you cut off the rear engine?
A. Cut off the rear engine, yes, sir.
Q. Where did you cut it off?
A. Right, I think, on this side of the crossing; a little this way from the crossing.
Q. What end of the rear end did you cut off?
A. Sir?
Q. What end of the rear end did you cut off?
A. Why, the tender part, cut off the engine from the train.
Q. Who cut off the front end?
A. I don't know who cut that off, to my knowledge.
Q. Isn't it a fact that you cut off the front end of the engine and Mr. Wilson cut off the rear end?
A. Mr. Wilson cut off the rear end?
Q. Isn't it a fact that you cut off the front end and Mr. Wilson cut off the rear end?
A. I don't know about that. I think I cut the hind engine and took water there.
252 Q. You don't know who did cut off the front end?
A. No, sir, that I don't recall.
Q. But you are not positive that you cut off the rear end, are you?
A. Pretty sure of it.
Q. And when you cut off the rear end of that engine where was Wilson?
A. Wilson was standing partially there at the engine.
Q. Standing right beside of it?
A. I couldn't say directly the side of it; he was standing about there.

Q. He wasn't up in front?
A. I hardly think, because I was there with the engine when he was giving it water, you see.
Q. And after you cut it off of that rear engine what did you do?
A. Mr. Wilson told me to go down, and there was a hot box six cars from the caboose, and then I got on the engine to go down. He said, "Wait a minute, Shorty, I am going with you." So then we started down towards the track, and we came opposite about to where the hot box was, and Mr. Wilson either fell off or jumped off, because I didn't notice him step off.
Q. What was the next thing you did after you cut off the rear end of the engine?
A. Took water.
Q. What did you do?
A. I went on to turn the spout.
Q. What did you do after that?
253 A. Then run the engine up to go down the siding.
Q. What did you do—you didn't run the engine up, but what did you do?
A. Well, I went up to throw the switch to let them in.
Q. What did you do then?
A. Started down the track, give them a signal to come on down to make the cut there, to set off the hot box.
Q. When you cut the engine off at the rear end of the engine, was it cut off at the front end at that time?
A. I suppose it was.
Q. Well, you were there. You know, don't you?
A. Sure. The hot box had to be cut off from the five cars.
Q. There was no other brakeman up around there, was there?
A. I was the only brakeman on the train.
Q. The fireman and engineer weren't cutting cars, were they?
A. Why, I don't know whether they were or not.
Q. They may have been?
A. They may have been, yes.
Q. Where did you stand when Wilson was talking to you about going down and cutting off the hot box, were you at the rear or front of the engine?
A. Why, that I couldn't tell you.
Q. Did you go over to the depot?
A. Not until after Mr. Wilson got hurt.
Q. Did you see Mr. Wilson and the engineer, Briggs and Miller go to the depot?
A. See Mr. Wilson?
254 Q. Yes.
A. Wilson didn't go to the depot.
Q. You didn't see him go to the depot?
A. No.
Q. You saw the engineer go to the depot?
A. That is, you mean the tower there in Peninsula?
Q. No, I mean the depot, ticket office there where the agent sells tickets?

A. The only time we went up there to the tower was when we went up to look for a stretcher to take Mr. Wilson up.

Q. Did you see either of the engineers leave their engines before you went back to cut off the hot box?

A. Why, now I seen Mr. Miller go down to oil his engine up when he was taking water there.

Q. When you went back you rode on the east end of the running board, didn't you?

A. What is that?

Q. You rode on the east end of the running board of this engine?

A. I don't know whether it was east or west, what it was; it was on the outside as we were backing down.

Q. You rode on the end of the running board that was away from the train?

A. Yes, sir, on the outside, away from the main track.

Q. Wilson was on the other end of that running board, wasn't he?

A. Yes next to his train, yes, sir.

Q. You had no conversation with him on the way down?

A. No, sir.

Q. Do you remember noticing anything while you were
255 going down on that trip?

A. In which way?

Q. When you were backing your engine along that siding do you remember noticing anything particularly?

A. No, when I was going down that way my mind was on my work. I was looking ahead of me.

Q. Well, what was there ahead of you that you were looking at?

A. Why, I generally always do look ahead to see where I am going that way, to give a signal, or something of that sort. I was watching down towards the caboose. Anybody would, you know, look ahead of the engine, which way they are going.

Q. Are you saying that because naturally a person would do that, or do you remember?

A. I don't know what other people do or not. That is what I was doing.

Q. Well, I am asking you if you remember, or do you say it just because naturally that is what would happen?

A. I don't quite understand you in that question.

The Court: Do you actually remember that you did that on this occasion, or do you just say you did because you always did it?

A. That was always my manner of doing that.

Q. Did you notice your train as you were backing up there?

A. Sir?

Q. Did you notice your train as you were backing up there?

A. The train backing up?

Q. No, did you notice your own train that was standing on the main track there when you were backing along down?

256 A. Yes.

Q. Did you notice that there were cars on the first track as you were backing along down there?

A. That I couldn't say, I didn't notice.

Q. Is there anything else that you have any recollection of noticing as you were backing your engine down there?

A. Not as I know of.

Q. When was the first time after Wilson was hurt that you ever conversed, had a talk with anybody about what happened there that night?

A. Well, only towards morning when we was talking among ourselves, the engineer and fireman that was left there on the other engine.

Q. And did you have any talk about how it happened then?

A. No, sir, because I couldn't tell how it happened.

Q. Did you have any talk at that time about the speed the engine was going?

A. No, sir, because I am a poor judge of speed; I couldn't say.

Q. You had no talk about it?

A. No, sir.

Q. You heard no one else say anything about the speed the engine was going at that time?

A. No, I don't believe I did.

Q. And from that time on when was the first time you had any talk with anybody about what happened that night?

A. Why, I never had any talk with anybody in particular, only when I came here to Chicago here.

257 Q. And when was that?

A. That was Monday.

Q. That was Monday of this week?

A. Monday of this week, yes sir.

Q. And from the time that you rode that engine down there with Wilson, backing up on that siding, until Monday of this week you had never talked about the speed that the engine was going?

A. No, sir, not to my knowledge, no, sir.

Q. Ever thought about it?

A. No, we all thought Mr. Wilson was dead, you see.

Q. And you didn't at any time think about the speed the engine was going?

A. No, I hardly—I am a poor judge of speed.

Q. The first time you ever thought about that speed was when you got here this week, isn't it?

A. Sir?

Q. The first time that you ever thought or talked about the speed that that engine was backing up there that night has been since you arrived here in Chicago this week then?

A. To my knowledge, yes.

Q. You didn't talk about it that night immediately after it happened because you are a poor judge of speed, is that the reason?

A. Yes, I am a very poor judge of speed. I couldn't tell exactly what it was going.

Q. You- recollection isn't as good as it would have been then, is it? That is, your judgment in regard to speed isn't as

258 good now as it would have been then, is it?

A. Probably it would be.

Q. How?
A. Probably it would be.
Q. Probably would be. Do you remember noticing any object as you were passing along there that night so that you could get any light on it or from any judgment as to the rate you were going?
A. No, not as I know of.
Q. Have you any recollection——
A. No, I don't believe I have.
Q. —as you were riding along there that night, of noticing at all or paying any attention to the rate of speed you were going?
A. No, sir.

Mr. Ives: That is all.
Mr. Clark: That is all, Mr. Van Winkle.

The Court:

Q. Wait a minute. You spoke about being on the running board. Describe the running board; tell us what the running board of the engine is.
A. Well, what we could call—or what I would call the running board or the step rather, on the engine is, instead of the board running all the way across from one end to the other under the draw head, it was divided in two parts. It would be about probably 2½ or maybe a little more, wider, on each side, and the center was vacant.
Q. Whereabouts on the engine is it?
A. On the hind end of the engine towards the tender.

259 Mr. Clark:

Q. Was it on the end of the tender or on the side of the tender?
A On the back of the tender.

Mr. Clark: That is all, unless the court desires——
The Court: No.
Mr. Ives: That is all.
Mr. Clark: That is all Mr. Van Winkle.

HOWARD V. MILLER, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. Clark:

Q. Mr. Miller, just take that chair there, please, and speak loud enough so that the farthest juror over here will have no trouble in hearing you. What is your name?
A. Howard V. Miller.
Q. Your residence?
A. 2711 West 14th street, Cleveland, Ohio.
Q. And your occupation?
A. Locomotive engineer on the B. & O. Railroad.
Q. How long have you been such engineer?
A. Eight years ago the 6th of this month.

Q. And on what——

A. Last month.

260 Q. What portion of the B. & O. road have you operated?

A. On the Cleveland division.

Q. That extends, among other places, through the town of Peninsula?

A. Yes, sir.

Q. That particular track goes from what point to what point?

A. The particular subdivision on which I work mainly leads from Cleveland to Valley Junction, going through Akron and Canton.

Q. Do you know the plaintiff here, Mr. Wilson, or know of him?

A. I am not very well acquainted with him, no, sir. We were only working with him one trip.

Q. Do you recall——

A. Or part of a trip.

Q. Do you recall the trip on which he was injured?

A. Yes, sir.

Q. When and where did you start on that trip?

A. We started from Clark Avenue in the B. & O. yards of Cleveland.

Q. And what did the train consist of, if you remember?

A. It was an ore train for Newcastle.

Q. Do you remember how many cars there were?

A. Why, I believe there was forty cars.

Q. More than one engine?

A. Yes, sir, we had two engines.

Q. Where were those two engines in the train, where were they placed?

A. The one on which I was on was 5 cars back in the train, five cars between the two engines.

261 Q. Who was in charge of the first engine?

A. Engineer Briggs.

Q. And you were in charge of the second engine?

A. Yes, sir.

Q. Do you recall anything in connection with the hot box in that train?

A. Yes, sir, we had a hot box in the train, intended to set it off at this place, Peninsula.

Q. What was the first that you knew of a hot box being in the train?

A. Why, I believe Mr. Wilson told me I had a hot box at Vaughan.

Q. At where?

A. At Vaughan.

Q. Where is Vaughan with reference to Peninsula?

A. Vaughan is the second station.

Q. About how far?

A. From Peninsula, preceding. Well it is about three miles.

Q. What did Mr. Wilson say at that time about the hot box?

A. Said he had a hot box and asked me where would be the best place to set it off.

Q. You replied what?

A. I replied Peninsula would be the best place to go, that far, because I had to stop there anyway to take water.

Q. Was anything done at Peninsula with reference to setting out the hot box?

A. Yes, sir. Having taken water we pulled up so that the rear end of the train would clear the siding at the west end, and cut the first engine and five cars off, and also the engine on which
262 I was on, letting them down through the siding.

Q. Was Mr. Wilson there at that time?

A. Yes, sir.

Q. What did he say, if anything, with reference to setting out this car after you got to Peninsula?

A. He said after we took water we would set off this hot box.

Q. Did he say how—what the method would be?

A. That wasn't—no, I don't think—he just—he didn't go into details of the method.

Q. Who was present when he said they will set out the hot box?

A. Well, I don't think there was anyone else right at that particular place at the very time he was speaking to me.

Q. Who was present with Wilson then? I want to get the situation as it was, that is all.

A. How is that?

Q. I just want to find out when and where it was that Wilson spoke at Peninsula?

A. Well, we were taking water at that time.

Q. And he said what?

A. Said that he would take this—set off this hot box.

Q. Did he say which engine would do the work?

A. No, I don't believe he did just say which engine would do the work.

263 Q. Did you say to him, "How are you going to set the hot box off?

A. No, sir.

Q. And did he reply, "I am going to pull it up to the clearing with this second engine cut off the train, and set it off to the rear, I am going to get off with the hot box and cut the box off there behind the hot box," did he say that?

A. No, sir.

Q. You have told us——

A. Not directly to me. Just merely said he would set off this hot box after having taken water.

Q. Now, tell us what you did, what was done with reference to setting the hot box out?

A. Well, after we took water, as I said before, we pulled the train up so the rear end would clear the west end of the siding, cut off the first engine and five cars ahead of me and pulled over the switch far enough so that I could get over the switch also with my engine and back down to the siding.

Q. Was your engine cut off in the meantime by somebody?
A. Yes, sir.
Q. Then as your engine backed down to the siding, do you know where Wilson was?
A. No, sir, I didn't know where. I knew that two men were on the rear of the engine.
264 Q. Now, just a little more definitely—where on the engine?
A. On the footboard on the bottom of the tank.
Q. Could you see them, could you see either one of them from where you were?
A. I saw them as they got on, but after they were on I couldn't see them any more.
Q. Then you started with your engine to back?
A. Yes, sir.
Q. Where was your train in the meantime?
A. The train was on the main track.
Q. How fast did you go as you went along there?
A. From probably 8 to 10 miles an hour.
Q. And did you know where in the train the hot box was, about where it was?
A. I knew about where it was, yes, sir.
Q. Where was it?
A. About six or eight car lengths from the caboose.
Q. Do you remember—do you know which side of the train the hot box was on?
A. It was on the opposite side from which we were, on the right-hand side of the train.
Q. Calling the tracks north and south there, which side of the train would it be on?
A. Be on the west side.
Q. Did you slack up as you approached about where the hot box was?
A. I shut off just a little before we got there, not knowing
265 just what my conductor wanted to do. Then I let the engine drift along as far as it would.
Q. What was the first that you knew that anything wrong had happened to Wilson or anyone else?
A. All at once I saw his lantern and the object of himself get off, and it seemed that he made some mismove, his lantern went against the car on the opposite track, and, as it seemed, to come in contact with the car laying on the track, his lantern went out and——
Q. What did you do?
A. Well, I thought there was something wrong and I began to stop the engine as quick as I could.
Q. How soon or how quickly did you stop?
A. When it stopped Mr. Wilson was just at the front of the engine.
Q. Did you get down from the engine?
A. Yes, sir, I did.
Q. And did you go to where Mr. Wilson was?

A. Yes, sir.

Q. Did you know before you got there who it was that was hurt?

A. Well, yes, sir—no, I had stopped. The head man came from behind the tank and gave me a signal to back up. I thought first we had hurt someone else, I thought it was the head man that was hurt, and I thought as I was stopped it was my conductor, and I told him we had hurt some one. I said, "I believe we hurt
266 the head man." "Well," he said, "I am the head man, it must have been the conductor."

Q. Did you get any signal from anyone to slacken up or stop as you were approaching?

A. No, sir.

Mr. Clark: You may cross examine.

Cross-examination by Mr. Ives:

Q. Did you know, Mr. Miller, where in the train the hot box was that you were going to cut off?

A. I didn't quite get that.

Q. Did you know where in the train the hot box was?

A. I knew about where it was, yes, sir.

Q. And where did you understand it was as you were backing up down there?

A. Somewhere near the rear end.

Q. Do you know about how far from the rear end?

A. Yes, sir.

Q. About how far?

A. About 6 or 8 car lengths.

Q. And did you know that some one, one of the men on the footboard would get off from the footboard in order to cut the train at that point?

A. No, sir, I had no way of knowing that at all.

Q. Did you expect that those men would ride on until the engine came down to the switch?

A. I rather expected they would ride to the rear of the train.

267 Q. Did you expect then that you would walk back those several car lengths and make the cut?

A. That would have been the proper way to do.

Q. You didn't have any idea of slowing up and letting them off at that point?

A. Yes, sir, if I have got a signal I would have, I would have slowed up immediately.

Q. Did you slow up before you got to that point?

A. I shut off before I got there.

Q. How far before you got there did you shut off?

A. About three car lengths.

Q. Your engine was drifting without power?

A. Yes, sir.

Q. Did the engine slow down any after you shut off the power?

A. That kind of an engine will slow down very quickly, after shutting off.

Q. And how fast were you going when you shut off the power?
A. About 8 or 10 miles an hour.
Q. How much did it slow down during those two car lengths?
A. It probably slowed down a mile or two an hour.
Q. How fast was it going at the time that Wilson got off?
A. At that rate it would be going about six or seven miles an hour.
Q. Were you making any observation at that time to determine how fast it was going?

268 A. We don't make any special observations to see how fast we are going. We have a certain habit *or* figuring about so fast under certain conditions and in certain places.

Q. Were you paying any attention as to how fast you were going at that time?
A. Well, I always run about so fast under those conditions that were existing at that time.
Q. When you are switching you sometimes run faster than you do at other times?
A. Yes, sir.
Q. You have no habit of speed you make when you are switching cars at a station, have you?
A. We have a—there is a certain rate of speed that we go ordinarily——
Q. In switching cars at a station in the yard?
A. Yes, sir——

Mr. Sheeam: I object to that. Finish the answer.

A. We don't make passenger train speed in switching cars.

Mr. Ives:

Q. But do you have any habitual regular rate of speed when you are switching cars?
A. Well, we don't confine ourselves just to a definite number of miles per hour, no, but we -sually range from, as I say, 7 to 10 miles an hour.
Q. Depends pretty much on how far you are going, doesn't it?
A. Yes, sir.
Q. If you were going half a mile you would be likely to go faster than if you were going a quarter of a mile, wouldn't you?

269 A. Well, when we are switching we wouldn't be expected to be going forty miles or half a mile when we are switching.

Q. I said, if you were going half a mile you probably would go faster than if you were going a quarter of a mile, wouldn't you?
A. That would depend on where it is. If we were going through the yard we wouldn't go any faster if we were going half a mile than if we were going 15 car lengths.
Q. Have you any definite recollection as to how many car lengths you had shut off your power before this accident happened?
A. I am just giving an estimate.
Q. Estimated about three car lengths?

A. Yes, sir.
Q. May be five or six?
A. Maybe four.
Q. May have been five, might it not? You haven't and definite recollection?
A. I don't—I make an estimate and I wouldn't hardly vary quite as much as that, I don't believe.
Q. You wouldn't want to back down on your estimate as much as that?
A. When I gave it in the first place I gave it the way I think it was.
Q. And you shut off your power for what purpose?
A. I shut off power for the purpose that expecting a signal any time from the men, and also the switch was about 12, 13, 14 car lengths from where I was at that time.
Q. Isn't it a fact that that car was going about 5, 6 miles an hour at the time that accident happened?
A. That car?
270 Q. Your engine?
A. Yes, it was going five or six miles an hour.
Q. That was about the rate of speed you were going, isn't it?
A. I said six or seven, yes, sir.
Q. May have been going five?
A. If an engine or car is going six or seven it certainly is going five or six.
Q. Well, may it not have been as low as at the rate of five miles an hour that you were going there?
A. I said before I think I was going six or seven miles an hour.
Q. Is that your signature, Mr. Miller (handing paper to witness)?
A. Yes, sir.
Q. And is this your signature (indicating)?
A. Yes, sir.
Q. When you signed your name here you stated it was going about five or six miles an hour, didn't you?

Mr. Sheean: I object to the form of the question.
The Court: Sustained.

Mr. Ives:

Q. When was it you signed this?
A. I signed that the same time, about a month or two ago.
Q. Where was it you signed it?
A. Signed it in my room.
Q. Where?
A. Cleveland.
Q. And at that time didn't you state that the engine was going five or six miles an hour at the time Wilson was injured?

271 Mr. Sheean: I object.

A. I gave some estimate, yes, sir.

Mr. Sheean: Wait a moment. I object to the form of the question, your honor.

Mr. Ives:

Q. Have you got a better recollection about the rate of speed that engine was going now than you had at the time you signed this statement?

A. At the time that I signed that statement there was a few minor details of that accident that had become a little stale to me.

Q. Yes, but have you got any better recollection now as to the rate of speed that that engine was going at the time that Wilson was hurt than you had at the time you signed this statement?

A. I have been thinking about the little incidents, and so on, since I have been called on this case, yes, sir.

Q. What are some of the little incidents that you have been thinking about?

A. Well, the different things that we did in setting off this car, this hot box.

Q. What is one of them that you have been thinking about?

A. Just where the train stood, just how the engines were cut off, and so on.

272 Q. How the engines were cut off?

A. Yes, sir.

Q. Have you been thinking of any other little instances since then?

A. I have been—certainly I have had the whole affair on my mind.

Q. What other instance have you thought of after you signed this statement?

A. Well, I have been thinking about the different things, all the different things that took place.

Q. Well, any one other thing can you remember?

A. Well, I have been thinking about how it came that Mr. Wilson told me how we were going to set out—asked me where would be the best place to set off the hot box, would be one.

Q. You have been thinking of that.

A. Yes, sir.

Q. Now how does your thinking about cutting off the engines up by the water tank refresh your recollection any as to the rate of speed your engine was going at the time Wilson was injured?

A. That would not have anything to do with it at all.

Q. Not at all. How does the conversation as to how you were going to set off that car have anything to do with refreshing your recollection as to the rate of speed the engine was going?

A. Thinking of anything would bring certain things back to your memory.

273 Q. So you think that your reflections on the conversation you had up there by the water tank, about how you were going to set that car off, has refreshed your recollection as to the rate of speed the engine was going, is that right?

A. No, sir, I don't think anything like that at all.

Q. Well, what little things have you been thinking about between the time you signed this statement and now that have refreshed your recollection any?

A. I have been thinking about every incident that took place there.

Q. What I am asking is to tell me one thing that you have thought about that would refresh your recollection any, between these two dates.

A. I don't quite understand what you want me to tell you.

Q. Well, what I want is for you to name some things that you have thought about that calls it up so that you remember better now as to the rate of speed that engine was going than you did when you signed this statement.

A. Well, in fact I was giving an estimate in every case.

Q. You were giving the best estimate you knew how?

A. Yes, sir.

Q. And do you think the estimate you give here from the witness stand is a better estimate than you gave at the time you signed this statement?

274 A. When I say I am going six or seven miles an hour, as you asked me a moment ago, about a car length or so, I might vary a mile an hour, a mile an hour would not be very much difference in speed.

Q. You can't think of anything that you thought of, can you, that refreshes your recollection at all?

A. I have thought the whole affair over in my mind.

Q. Except the whole general affair. Have you talked with any one since you signed this statement?

A. Yes, sir.

Q. Who have you talked with?

A. I talked to the Claim Agent of the B. & O.

Q. Where did you talk with him?

A. In his office.

Q. How?

A. In his office.

Q. Where?

A. In Chicago here.

Q. And you talked with him in Akron too, didn't you?

A. Yes, sir.

Q. Did you talk with him in Cleveland?

A. I talked with the Claim Agent in Cleveland of the Cleveland Division soon after this accident occurred, but——

Mr. Ives: That is all. I wish to mark this for identification.

Mr. Sheean: Well, it is not offered yet.

Mr. Ives: Not yet. Mark it for identification.

(Said document was marked for identification Plaintiff's Exhibit 3 of this date.)

275 Redirect examination by Mr. Sheean:

Q. Mr. Miller, in whose handwriting is that statement?

A. Mr. Kroell.

Q. What is Mr. Kroell's business, if you know?
A. Why, he calls himself an investigator, I believe.
Q. And where did he come to get this statement from you?
A. Well, the statement was taken at my room in Cleveland.
Q. That is the same Mr. Kroell who has been in the court room here, or have you seen him?
A. I haven't seen him since.
Q. This gentleman that sits next to the lady here?
A. Yes.
Q. Was any one present besides you and Mr. Kroell at the time that statement was taken?
A. No, sir.
Q. After it was taken was it read over to you?
A. I don't recollect now.
Q. You have no recollection as to that?
A. No, sir.

Mr. Sheean: That is all.

276 STEPHEN O. LEWIS, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Clark:

Q. Mr. Lewis, please speak loud enough so that the furthest juror will have no trouble hearing you. What is your name?
A. Stephen O. Lewis.
Q. Your residence?
A. Bartelme (?) Avenue, Newcastle, Pa.
Q. And your occupation?
A. I am a locomotive engineer.
Q. For whom?
A. Baltimore & Ohio Railway Company.
Q. How long have you been such locomotive engineer?
A. Six and one half years.
Q. Where do you run an engine on that road?
A. Between Newcastle and Chicago Junction, Lorraine and Cleveland.
Q. Do you remember the—I will ask you first if you know the plaintiff, Mr. Wilson here?
A. I do.
Q. You recall the time that he was injured, do you, about that time?
A. I do, yes, sir.
Q. I will call your attention now particularly to—ask you whether or not you recall making a trip with Conductor Wilson on
277 August 22, I think it was, or August 21, from Newcastle?
A. I do, yes, sir.
Q. Do you remember where that train was from, from what point to what point?

A. It was from Newcastle to Warwick that I had Mr. Wilson with me.

Q. Do you remember when you left Newcastle?

A. Yes, sir, I was called for 5.10 P. M. and I left there about 6:30 P .M.

Q. State if you know whether there is a difference in the time for which engineers and conductors of the same train are called, whether there is a regular arbitrary difference?

A. There is 20 minutes' difference. The engineer is called 20 minutes ahead of the conductor, in order to give him 20 minutes to get his engine ready.

Q. You were called for 5:10?

A. I was.

Q. And left at what time?

A. 6:30.

Q. What time did you arrive at Warwick?

A. About six o'clock A. M. on the 22nd.

Q. Did you leave Warwick with your train?

A. I did not.

Q. What was done with your train after you got to Warwick?

A. Well, we had a few switches to make, and we did that work and then pulled to the west end of the west-bound siding and stopped.

Q. And stopped. Why did you stop?

A. Well, I——

278 Q. Why were you stopped, if you know?

Mr. Ives: That is, if you know of your own knowledge.

A. Why, there was a passenger train due there and also a fast freight train, and I could not get out ahead of those. I was a slow freight.

Mr. Clark:

Q. I call your attention and ask you whether or not you completed the original trip on which you started, or whether you were relieved?

A. I was relieved.

Q. Where?

A. At Warwick.

Q. At what time were you relieved?

A. 8:45 A. M.

Q. Do you know where the relief crew came from, or how they got to Warwick?

A. They came on No. 12.

Q. That is a passenger or freight train?

A. It is a passenger train from Cleveland.

Q. Was that running on the opposite track from what you were running on?

A. Yes, sir, it was coming toward me.

Q. And you say the relief crew came. Who relieved you as engineer?

A. Engineer H. H. Smith from Lorain.

Q. Do you know who relieved Conductor Wilson as conductor?
A. Mr. Stewart.
Q. And you set the time as 8.45?
A. Yes, sir.
Q. What was the first that you saw of these relief men as they came to your train, when did you first see them?
279 A. Why, Engineer Smith got upon my engine at 8.45, that was the first I saw of him.
Q. And train No. 12, where was that in the meantime, if you know?
A. Well, No. 12 came in on the east-bound track and did not stop at my engine, it stopped at the coal tipple to let those men off.
Q. No. 12 ran past your engine?
A. Yes, sir, past my engine.
Q. And stopped where?
A. At the coal tipple, about a hundred car lengths further east.
Q. Do you know whether the relief men got off there?
A. Yes, sir, they did.
Q. And then at 8.45 Mr. Smith relieved you?
A. Yes, sir.

Mr. Clark: You may cross examine.

Cross-examination.

By Mr. Ives:

Q. Where was your train from the station at Warwick?
A. It was at the west end of the west-bound siding.
Q. How far from the station?
A. Two hundred car lengths.
Q. About how far would that be in miles, half a mile or two miles?
A. Well, it is something over a mile, I would think, about a mile.
Q. And the line that that relief train came on, was that—it
280 came from the north, did it not?
A. It came from the west. That is east and west there.
Q. From the west?
A. Yes, sir.
Q. Warwick is a junction?
A. Well, it is not a junction. Yes, it is a junction of the—the C. L. & W. trains turn off there. No. 12 was a C. L. & W. train.
Q. And did the train that the relief crew came on, did that go right by your train?
A. Yes, sir.
Q. How near to it?
A. Why, the tracks there are about 50 feet apart.
Q. Was it a passenger train they came on?
A. Yes, sir.
Q. Do you remember—do you know whether that was a through passenger train?
A. Well, it is a——
Q. How?

A. It is a local passenger train, it does local work, that is, stops at every station.

Q. A local passenger train? How far from your engine was it that the relief crew got off from that passenger train?

A. 100 car lengths.

Q. How?

A. 100 car lengths.

Q. About half way to the depot?

A. Yes, sir.

Q. What was there at the place they got off?

A. There is a coal tipple and water tank there.

Q. Did your tracks run east and west there?

281 A. Yes, sir.

Q. Were you in the yard?

A. No, I was not really in the yard, I was on the passing siding, the track that we used for trains to pass us on.

Q. Was there a yard to the east of you?

A. Yes, sir.

Q. How many tracks in the yard?

A. There is four tracks.

Q. Four tracks in addition to main tracks?

A. Yes, sir, four short tracks lay between these east and west-bound main tracks.

Q. And what track were you on? That is, numbering from the main track what track were you on?

A. I was on the track laying next to the west-bound main.

Q. The west-bound main would be the north main, wouldn't it?

A. Yes, sir.

Q. And you were on the next track to it?

A. Yes, sir.

Q. Your engine was on the west end of your train?

A. Yes, sir.

Q. And your station on your engine was at the north side of your engine. wasn't it?

A. You mean my——

Q. Yes, on the north side of the engine, you were —.

282 A. Yes, sir.

Q. Were you in the yard?

A. No, I was not really in the yard, I was on the passing siding, the track that we used for trains to pass us on.

Q. Was there a yard to the east of you?

A. Yes, sir.

Q. How many tracks in the yard?

A. There is four tracks.

Q. Four tracks in addition to main tracks?

A. Yes, sir, four short tracks lay between these east and west-bound main tracks.

Q. And what track were you on? That is, numbering from the main track what track were you on?

A. I was on the track laying next to the west-bound main.

Q. The west-bound main would be the north main, wouldn't it?

A. Yes, sir.
Q. And you were on the next track to it?
A. Yes, sir.
Q. Your engine was on the west end of your train?
A. Yes, sir.
Q. And your station on your engine was at the north side of your engine, wasn't it?
A. You mean my——
Q. Yes, on the north side of the engine, you were facing
283 west?
A. Yes, sir, that is right.
Q. And were you on your engine all the time?
A. Well, yes, I think that I was. I think I went to the telephone first there, there is a telephone booth right there, and I think I went there first when I pulled down there.
Q. What for?
A. To see whether I was going to go out or not.
Q. Wasn't that the conductor's business?
A. It was also my business.
Q. Your orders come from the conductor, do they not, for the movements that you make?
A. Well, not exactly. I have the same authority as a conductor.
Q. You have no authority to move a train without the direction of your conductor, have you?
A. Oh, yes, I have, if I go to the telephone and get permission to go from the dispatcher, which I do a great many times.
Q. But whenever you do it you do it through an understanding from the conductor, do you not?
A. Oh, no, lots of times the conductor is in the caboose, maybe a hundred car-lengths back.
Q. But in this case the conductor was up at the head end, wasn't he?
A. I believe he was that day, yes, sir.
Q. And he was at the telephone booth himself?
284 A. Yes, sir.
Q. And when you were at the telephone booth yourself ready to take orders did you take any orders?
A. Well, sometimes I have called up when the conductor has been right there with me.
Q. I understand you to say that your train was north of the main track?
A. No, my train was on the south side of the west-bound main track.
Q. The south side. And where was the coaling station, on what side of the main track?
A. The coaling station?
Q. Yes, the coal tipple?
A. Well, you can get coal on the east or west bound main track or siding.
Q. And this train stopped, this passenger train stopped on the south side, didn't it?

A. Yes, sir.
Q. Were you looking back there at the time?
A. I don't think that I was.
Q. Do you know whether the conductor of the relief crew went to the station to get orders from the telegraph operator there, do you know whether he did or not?
A. No, I don't, no more than that Mr. Smith, the engineer that relieved me, told me that he got off at the coal tipple.
Q. You have no knowledge of what the conductor of that crew did, though? You have no knowledge of your own?
285 A. No, I have not.
Q. How long did you remain there after Smith came and got on your engine?
A. Well, it was probably an hour and a half.
Q. Do you remember what time you left?
A. No. I don't exactly. In the neighborhood of ten o'clock.
Q. 10:37, wasn't it?
A. Possibly it was. I don't know exactly.
Q. Did they make any switching movement to that train after Smith got on the engine?
A. No, I don't think so.
Q. You were all ready to go at the time that crew arrived there, weren't you?
A. Yes, sir.
Q. And had been ready for some little time?
A. Yes, sir.
Q. Still working for the B. & O. aren't you?
A. Yes, sir.
Q. And have you talked over any of these matters that you have testified about until recently?
A. Sir?
Q. Have you talked with anybody about any of these matters that you have testified concerning until recently?
A. No, I haven't.

Mr. Ives: That is all.
Mr. Clark: That is all.

286 HENRY H. SMITH, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Clark:

Q. Mr. Smith, please in giving your answers speak loud so that the farthest gentleman over there will have no trouble hearing you. What is your name?
A. Henry H. Smith.
Q. And your residence?
A. Lorain, Ohio.
Q. Your occupation?
A. Locomotive engineer.
Q. For what company?
A. B. & O. Railway Company.

Q. How long have you been such engineer?
A. About ten years.
Q. On what part of the B. & O. road have you been employed?
A. On the Cleveland Division, formerly C. L. & W.
Q. I will ask you whether you recall a trip made by yourself as engineer and Conductor S. M. Stewart to relieve a train at Warwick in August, 1913?
A. Why, I can recall part of the trip; not all of it, though.
Q. Do you recall the name of the engineer that you relieved at that time?
A. Yes.
Q. Who was it?
A. S. O. Lewis.
287 Q. Is that the gentleman that just left the stand?
A. What is that?
Q. Is that the man that just left the witness chair?
A. Yes.
Q. Where did you relieve him?
A. The west end of Warwick.
Q. How did you get there?
A. Why, dead-headed out of Lorain on train 26, and No. 12 out of Lester.
Q. From Lorain on No. 26 to Lester?
A. Yes, sir.
Q. And then how?
A. No. 12 from Lester to Warwick.
Q. Do you remember what you did as soon as you got off of the train?
A. Well, I can't recall that at all.
Q. Do you recall going to the engine that Mr. Lewis was in charge of?
A. Yes.
Q. Do you remember the time that you relieved him?
A. No, I don't.
Q. With whom, if any one, did you go from the train to the—from the passenger train to the freight train?
A. I didn't get that.
Q. Did you go alone from the passenger train to the freight train, or was any one with you?
A. Why, if I remember right I think the whole crew was with us. I know my fireman was.
288 Q. Yes, and who was your conductor?
A. Stewart.

Mr. Clark: That is all. You may cross examine.
Mr. Ives: No cross-examination.

S. M. STEWART, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Clark:

Q. Mr. Stewart, please speak loud enough so that they will all hear you. What is your name?
A. S. M. Stewart.
Q. Your residence?
A. Lorain, Ohio.
Q. Your occupation?
A. Conductor on the B. & O.
Q. For how long about?
A. Six years last February.
Q. And on what part of the B. & O. system are you employed?
A. On the Cleveland Division.
Q. I call your attention to the month of August, 1913, and ask you whether you recall a trip in which you dead-headed to Warwick to relieve a freight crew?
A. Yes, sir.
289 Q. Where did you start that relief trip, as far as you were concerned?
A. At Lorain.
Q. And how did you get to Warwick?
A. Dead-headed on No. 26 and No. 12.
Q. How far on No. 26?
A. To Lester, and No. 12 from Lester to Warwick.
Q. Lester being between Warwick and Lorain?
A. Yes, sir.
Q. Do you remember what train or who it was that you were to relieve and did relieve at Warwick?
A. It was an extra, 2715, and a conductor by the name of Wilson.
Q. Is that this gentleman here who is plaintiff in this case? Possibly you may recall him.
A. It must be, but I don't—I never seen the man before nor since.
Q. Where did you find—you did relieve Conductor Wilson at that time, did you, at Warwick?
A. Yes, sir, I relieved Conductor Wilson.
Q. Where did you find his train?
A. Well, I can't positively state whether it was at the west end of Warwick or at the coal tipple.
Q. Now you say at the west end of Warwick. Explain that to the jury so that they will understand what that means with reference to Warwick station.
290 A. Well, at the west end is a siding where there is a telephone located where a man has to get a clearance over the telephone before entering the main track.
Q. Where is the coal tipple which you speak of with reference to this telephone and Warwick station?
A. Just about middle ways, and I—it is probably 200 car lengths

or in that neighborhood from the Warwick tower to the west end of the siding.

Q. And how far would you say from the coal tipple to the west end of the siding?

A. Near a hundred car lengths.

Q. Do you know at what time you relieved Conductor Wilson?

A. At 8.45 A. M.

Q. Just what does that mean, that you relieved him?

A. That was the time that I went to the man after the bills for the train.

Q. Did you then take charge of the train?

A. Yes, sir.

Q. And after you took charge of the train when, if you recall, did you leave Warwick?

A. Well, I can't positively remember that.

Q. Where was the train destined? Where was it going?

A. Cleveland.

Q. Do you remember when you got to Cleveland?

A. Yes, sir.

291 Q. What time was that?

A. At 5:10 P. M.

Q. And you are positive that you relieved Conductor Wilson at what time, do you say?

A. 8:45.

Q. Did you make a record of that?

A. Yes, sir.

Q. At that time. Have you that record with you?

A. I have the train book with the record in it.

Q. Yes, have you got it with you?

A. Yes, sir.

Q. Will you just turn to that, please, in your train book that contains that record? (Witness produces book.) What is that book that you now have there?

A. It is a conductor's train record.

Q. Is it kept by you personally?

A. Yes, sir.

Q. The entries in there were made by whom?

A. My own handwriting.

Q. Your own handwriting?

A. Yes, sir.

Q. Have you found the entry relating to the time in question?

A. Yes, sir.

Q. What does it say?

A. "Dead-headed from Lorain to Warwick on No. 26—12, relieved Conductor Wilson, engine 2715, at 8:45 A. M."

Q. This entry was made at that time?

A. Yes, sir.

Q. I call your attention to—please look at this paper and state what that is (handing document to witness).

A. That is our time slips that we turned in at the end
292 of each trip.

Q. What trip does that cover?

A. The same trip, from Lorain and Warwick to Cleveland.

Q. Did you fill the blanks there, make the entries?

A. Yes, sir.

Q. Please look at that end and see whether there is anything there indicating the time at which you relieved Conductor Wilson.

A. There it is (indicating), we make a notation right on the back there.

Q. Did you make that notation?

A. Yes, sir.

Q. Won't you please read it?

A. "Dead-headed from Lorain to Warwick on No. 26 and No. 12, relieved Conductor Wilson, engine 2715, at 8:45 A. M."

Q. That was made by you on the——

A. Yes, sir.

Q. At the time in question. This is a slip that you are—are you required in the performance of your duty to fill out these?

A. Yes, sir, that is where we get our money.

Mr. Clark: I now offer, if the Court please, the page or double page, rather, in the book produced by the witness and called his train book, relating to the trip in question and to which he has testified, and ask that it be marked Defendant's Exhibit 2. And we also offer in evidence the paper identified by the witness as the time slip from which he gets his pay, covering the trip in question.

Said documents marked as Defendant's Exhibits 2 and 3 respectively were received in evidence and are in words and figures following:

(Here follow train sheets marked pages 293 and 294.)

CHARTS

TOO LARGE FOR FILMING

295 Mr. Clark: You may cross examine.

Cross-examination by Mr. Ives:

Q. What time did the train on which you arrived at Warwick from Lorain reach Lorain—or reach Warwick?

A. Well, it must have been about 8:40, 8:35 to 8:40, somewheres near there.

Q. Wasn't it 8:44?

A. Well, I don't know just the exact minute that the train reached Warwick.

Q. Have you ever examined the train sheet showing the time that your train arrived in Warwick?

A. That my train had?

Q. The relief train.

A. No, sir.

Q. You haven't made any examination?

A. No, sir.

Q. Now you say that you relieved extra 2715?

A. Yes, sir.

Q. You would not remember that, would you, if you had not examined your record in regard to that?

A. I probably would not, but that is why I keep my record.

Q. Yes, you not only probably would not, but you are quite sure you would not, isn't that so? You don't keep any record in your mind of the number of engines that haul trains that you relieved as far back as ten months, do you?

A. Oh, no, that would be impossible to do it.

296 Q. Impossible to do it. It is impossible to do it in this case, isn't it?

A. It is not impossible with the train record.

Q. Yes, it is just the train record you have in mind. Now that is true, isn't it, of the time of the departure of your train for Cleveland from Warwick on that morning, isn't it? You have no recollection of the time of departure except your record?

A. No, sir, I had no—I don't remember what time we left Warwick.

Q. And that is true also, is it not, of the time that you relieved the crew?

A. No, sir.

Q. How?

A. No, sir.

Q. Would you remember that without any records?

A. I would not remember it without a record, but I keep a record of it so I can remember.

Q. So that when you are testifying here, you are testifying not from your recollection——

A. No, sir.

Q. —but from your record?

A. From my record.

Q. That is right. Now you say it was about 200 car lengths down

to the depot from where the train was that you relieved, is that right?

A. Yes, sir, about 200 from the tower to the west end.

Q. Have you had any conversation with any one in which Mr. Lewis was present, fixing the distance at 200 car lengths?

A. No, sir.

297 Q. What did you do after you relieved that train crew at Warwick?

A. Why, I don't just remember what I done, but it must have been the first thing to call up for to try to get out of there.

Q. You don't remember that, however?

A. No, sir, I don't just remember of doing it, but I know I did it.

Q. You know you had to do it?

A. Yes, sir.

Q. And that is the reason you say you did it now?

A. Yes, sir.

Q. How long were you there altogether after you got in? That is, as far as you remember now?

A. I don't remember.

Q. And do you remember making any switching movement at all there?

A. I did not make any at Warwick.

Q. Do you remember talking with Mr. Wilson after you got started for Cleveland?

A. No, sir, I don't remember of talking. I possibly did.

Q. Do your remember any conversation with him in regard to registering 8:45 A. M.?

A. No, I don't remember of making any—having any conversation with him, only——

Q. Not of any conversation of any kind?

A. I might have said that "I will mark this relieved at 8:45 A. M."

Q. You might have said it?

A. I might have said it while I was writing down, putting it down.

298 Q. But you don't remember?

A. No, sir.

Q. Do you remember where you were when you put it down?

A. No, I don't.

Q. Do you remember whether you made any comparison with Mr. Wilson's record of the time?

A. No, sir.

Q. Do you remember Mr. Wilson saying to you that he would register at 8:45 in order to clear the 16 hour law?

A. No, sir.

Q. You don't remember any such conversation?

A. I do not.

Q. Would you say that you did have any such conversation?

A. I know I did not.

Q. How?

A. I know I did not.

Q. You know you did not have?
A. Because I know there is no cause for it.
Q. You don't know what time he left with that train before you relieved him?
A. Well, a man has the privilege of relieving himself.
Q. I did not ask that. I say you have no knowledge, have you, of the time he left Newcastle?
A. No, sir, no sir, I don't know.
Q. You have no knowledge of whether there was any cause for it or not, have you?
A. No, sir.

Mr. Ives: That is all.

299 Redirect examination by Mr. Sheean:

Q. Mr. Stewart, did you put down in this book any other or different time as the time you relieved him from the actual time that you did relieve him on the day in question?
A. No, sir.

Mr. Ives: I object to leading the witness.
The Court: He may answer.

Mr. Sheean:

Q. What was the answer?
A. No, sir.
Q. Is the time recorded in your book the true and correct time at which you relieved Wilson?
A. Yes, sir.
Q. Did you have any conversation with Wilson of any sort as to either of your falsifying your records?
A. No, sir.

Mr. Sheean: That is all.
Mr. Ives: That is all.
Mr. Sheean: That is all the testimony, except the stipulation, which can be read at any time.
The Court: You can read the stipulation Monday.

Court adjourned until Monday, July 6, A. D. 1914, at 10:00 A. M.

300 CHICAGO, July 6th, 1914—10 o'clock a. m.

Met pursuant to adjournment.
Present: Same as before.
Mr. Sheean: I desire to read into the record the stipulation entered under date of June 26th, 1914, by the attorneys of record of both parties.
Whereupon said stipulation was read to the Jury, in the words and figures following, to wit:

301 STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

B 2107.

JAMES B. WILSON
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY, a Corporation.

It is hereby stipulated between the parties hereto that the times shown in the schedules hereinafter following are the times shown by the train sheets for the arrival and departure of the trains hereinafter specified in connection with said schedules; that said train sheets are made up by train dispatchers from telegraphic reports received by them from the telegraph operators at the several stations where said trains arrive and depart; that the several dispatchers who made the several sheets would if present testify that said sheets were made by them respectively, and that the figures thereon indicating the times of arrival at and departure from said places shown on said train sheets of the several trains shown thereon were correctly entered by them on said sheet from the information so received as aforesaid from the telegraph operators at the said several stations.

It is further stipulated that the several operators located respectively at the places or stations hereinafter mentioned would if present testify that they correctly noted and reported to said respective train dispatchers the times of the arrival and departure of said
302 trains at and from their several stations:

I.

1913.
Aug. 19. 5:19 P. M., train Number 13, upon which the plaintiff, Wilson, was, left New Castle Junction; and at
" " 6:08 P. M., said train arrived at Ohio Junction; and at
" " 11:03 P. M., train Extra Engine 4057 East left Ohio Junction in charge of the plaintiff, Wilson, for New Castle Junction; and at
Aug. 20. 1:10 A. M., arrived at New Castle Junction; and at
" " 2:43 A. M., said plaintiff was relieved from further charge of said train.

II.

Aug. 20. 4:03 A. M., train 1st 97, upon which the plaintiff, Wilson, was, left New Castle Junction; and at
" " 5:11 A. M., arrived at Ohio Junction; and at
" " 6:10 A. M., the plaintiff at Ohio Junction took charge of Extra Engine 4088 East, and left there for New Castle Junction; and at

" " 10:40 A. M., arrived with said train at New Castle Junction; and at
" " 10:50 A. M., said plaintiff was relieved from further charge of said train.

III.

Aug. 20. 5:12 P. M., train 13, upon which the plaintiff was, left New Castle Junction; and at
" " 7:33 P. M., said train, with the plaintiff, arrived at Akron Junction, where plaintiff took charge of train double-header Engines 4044 and 4042 East; and at
" " 12 Midnight, plaintiff left in charge of said double-header train for New Castle Junction; and at
" 21. 9:05 A. M., arrived at said New Castle Junction with said double-header train, and was relieved from further charge of said train.

303

IV.

Aug. 21. 6:30 P. M., train Extra Engine 2715 West left New Castle Junction in charge of the plaintiff, Wilson; and at
" 22. 6:05 A. M., said train arrived at Warwick, Ohio, in charge of plaintiff, Wilson; and at
" " 8:45 A. M., the plaintiff, Wilson, was relieved from charge of said train by Conductor S. M. Stewart; and at
" " 10:37 A. M., said train left Warwick for Cleveland in charge of said Conductor Stewart; and at
" " 5:10 P. M., arrived at Cleveland, Ohio.

V.

Aug. 22. 8:44 A. M., train Number 12 arrived at Warwick.

It is further stipulated that when the plaintiff was relieved of the charge of train Extra Engine 2715 West at Warwick on August 22d, he was directed by the defendant to go upon said train to Cleveland, Ohio, and did so, arriving there at 5:10 P. M.

Dated this 26th day of June, A. D. 1914.

(Signed) WEYMOUTH KIRKLAND,
C. E. STENNING &
MORSE IVES,
Attorneys for Plaintiff.

(Signed) CALHOUN, LYFORD & SHEEAN,
Attorneys for Defendant.

304 Mr. Sheean: The defendant rests, your Honor.

Mr. Ives: I wish to offer in evidence the statement bearing the signature of H. V. Miller.

Mr. Sheean: That is objected to your Honor, because the only possible basis for its reception in evidence is contained in a single sentence, because the statement goes into a number of matters that are not in evidence in the case.

Mr. Ives: Then, if the Court please, I will limit my offer to that sentence.

Mr. Sheean: You want to offer that one sentence?

Mr. Ives: Just the one sentence.

Mr. Sheean: Then we can avoid any discussion of it by reading that into the record.

Mr. Ives: If we can agree on the sentence, as I presume we can.

Mr. Sheean: Yes.

Whereupon said sentence was read into the record in the words and figures following, to wit:

"We was drifting along about 5 or 6 miles an hour."

305 The foregoing was all the evidence offered or received upon the trial of the above-entitled cause.

Whereupon, counsel for defendant presented to the court the following motion in writing, to wit:

"Comes now the defendant in the above-entitled cause, by Calhoun, Lyford & Sheean, its attorneys, at the close of all the evidence on behalf of both the plaintiff and the defendant, and moves the court to give to the jury a written instruction in the following form:

" 'The court instructs the jury to find the defendant not guilty.'

But the court denied and overruled said motion. To which action of the court in so denying and overruling said motion, the defendant, by its counsel, then and there duly excepted.

And with the aforesaid motion, the defendant tendered to the court a written instruction reading.

"The court instructs the jury to find the defendant not guilty,"

and requested the court to mark said instruction "Given" and read the same to the jury. But the court refused to give said instruction, and refused to mark said instruction "Refused". To which action of the court in so refusing to give said instruction and in so marking said instruction "Refused," the defendant, by its coun-

306 sel, then and there duly accepted.

And thereupon, after argument of counsel, the court marked "Given" and gave to the jury, at the request and on behalf of the plaintiff herein the following instructions numbered respectively from 1 to 6 inclusive, to wit:

1. The jury are instructed that at and before the time of the plaintiff's injury there was in force as the law an Act of the Congress of the United States, enacted for the safety of employes of common carriers engaged in the transportation of passengers or property by railroad from one state of the United States to any other state of the

United States, and for the safety of travellers upon such railroads and it is provided in this Act that the term "employe" as used in this Act, shall be held to mean "persons actually engaged in or connected with the movement of any train"; and it is further provided in said Act that it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employe subject to this Act, to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours, he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty.

The jury are instructed that if you find from a preponder-
307 ance of the evidence, under the instructions of the court in this case, that the defendant required or permitted the plaintiff from a time during the afternoon of August 21st, 1913, until a time in the forenoon of August 22nd, 1913, for a period of more than sixteen consecutive hours, to work and be actually engaged in or connected with the movement of a train, as charged in the plaintiff's declaration, or some count thereof, and that the plaintiff as a proximate result of such violation of said Act was injured, then in such event you are instructed that negligence upon the part of the plaintiff, if any, contributing to bring about his injury, is no defense in this case, and should not be considered by you in determining whether or not the defendant is guilty in this case. And further, if you find the defendant violated the Act above mentioned in this instruction, as aforesaid, and that such violation proximately contributed to plaintiff's injury, then you are instructed that you should not consider negligence, if any, on the part of the plaintiff at all in determining the amount of the plaintiff's damages, if any, in this case.

Given.

308 2. The jury are instructed that it is provided by an Act of Congress, which was in force as the law at the time the plaintiff was injured, that every common carrier by railroad while engaging in commerce between any of the several states of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment. It is further provided that in all actions brought against any such common carrier by railroad under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employe, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe. It is provided by said Act, however, that no such employe who may be injured shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury of such employe. It is further provided by this Act that in any action brought against

any common carrier under or by virtue of any of the provisions of this Act, to recover damages for injury to any of its employes,
309 such employe shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury of such employe. Given.

3. The jury are instructed that if, after fairly and impartially considering the testimony of all the witnesses in this case and the evidence and the facts and circumstances in evidence before you in this case, you believe from the evidence that the plaintiff at the time of and prior to the accident in question exercised that degree of care for his own safety that an ordinarily prudent person would have exercised under the same circumstances and conditions as shown by the evidence in this case, then you are instructed that you should find that the plaintiff was at and before the accident in question in the exercise of ordinary care for his own safety. Given.

4. The court instructs the jury that the plaintiff is not bound to prove his case beyond a reasonable doubt, but is only bound to prove it by a preponderance of the evidence. If the jury find that the evidence bearing upon the issues in this case preponderates in his favor, although but slightly, it would be sufficient to justify a finding of the issues in his favor. Given.

310 5. The court instructs the jury that if from the evidence and under the instructions of the court you find for the plaintiff, and further find that the defendant is guilty, as charged in the plaintiff's declaration, of requiring and permitting the plaintiff to work in violation of the law regulating the hours of service of employes; and if you further find that such violation of such law proximately contributed to cause plaintiff's injury, then in determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to and they should take into consideration all the facts and circumstances pertaining to his injuries as proven by the evidence before them; the nature and extent of plaintiff's physical injuries resulting from the accident in question, if any, so far as the same are shown by the evidence; his suffering in body, if any, resulting from such injuries, and such future suffering and loss of health, if any, as the jury may believe from the evidence before them in this case he will sustain by reason of such injuries; his loss of time and inability to work, if any, on account of such injuries; and may find for him such sum as in the judgment of the jury, under the evidence and instructions of the court in this case, will be a fair compensation for the injuries he has sustained or will sustain, if any, so far as such damages and injuries, if any, are shown by the evidence to be a direct result of the accident in question and are claimed and alleged in the declaration. Given.

311 6. The court instructs the jury that if from the evidence and under the instructions of the court you find for the plaintiff and further find that the plaintiff was guilty of no negligence contributing to this injury, then in determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to and they should take into consideration all the facts

and circumstances pertaining to his injuries as proven by the evidence before them; the nature and extent of plaintiff's physical injuries resulting from the accident in question, if any, so far as the same are shown by the evidence; his suffering in body, if any, resulting from such injuries, and such future suffering and loss of health, if any, as the jury may believe from the evidence before them in this case he will sustain by reason of such injuries; his loss of time and inability to work, if any, on account of such injuries; and may find for him such sum as in the judgment of the jury under the evidence and instructions of the court in this case, will be a fair compensation for the injuries he has sustained or will sustain, if any, so far as such damages and injuries, if any, are shown by the evidence to be a direct result of the accident in question and are claimed and alleged in the declaration. Given.

To the giving of which instructions so numbered respectively from one to six inclusive, and to the giving of each one thereof, the defendant, by its counsel, then and there duly excepted.

312 And thereupon at the same time, the court marked "Given" and gave to the jury, at the request and on behalf of the defendant herein, the following instructions numbered respectively from 7 to 22 both inclusive, to wit:

313 7. It is your duty to find a verdict based solely upon the law and the evidence, and not allow yourselves to be influenced by any feeling of sympathy or bias, or any consideration other than the law and the evidence. You are instructed that no remarks of counsel made either in argument or otherwise, in the progress of this trial, are to be regarded by you as evidence unless they are express admissions of fact agreed to by the other side. The evidence consists only of these facts which have been admitted, or which have been testified to, and any documents that have been received as evidence in the case. Given.

314 8. The fact that the court has submitted this case to the jury for determination should not be taken or considered by the jury as any intimation by the court that the defendant is liable. It would be wholly unwarrantable for the jury to consider that fact as implying or intimating any opinion by the court on the question of defendant's liability. Given.

315 9. The jury must rely upon the instructions of the court as to the law, and upon the evidence as to the facts in this case. You should not in any manner be moved by passion or prejudice, and should not allow either of these elements to enter into a consideration of the issues; nor should you be in anywise unfluenced by the fact that the plaintiff is an individual and the defendant a corporation. Corporations are entitled to the same fair and unprejudiced treatment in courts of law as individuals would be under like circumstances. It is your duty to consider and determine this case without reference to, and without being influenced by, the personality of either the plaintiff or the defendant. Given.

316 10. The court instructs the jury that while the law permits the plaintiff in this case to testify in his own behalf, nevertheless, the jury have the right, in weighing his evidence for the pur-

pose of determining how much credence ought to be given to it, to take into consideration the fact that he is the plaintiff and interested in the result of the suit. Given.

317 11. If the evidence preponderates in favor of the defendant on the question of defendant's liability, then you must find the defendant not guilty.

So, if the evidence in the case fails to preponderate in favor of the plaintiff on the question of defendant's liability, then your verdict must be for the defendant.

So, if the evidence in this case is evenly balanced as between the contention of the plaintiff and that of the defendant on the question of defendant's liability, then your verdict must be for the defendant. Given.

318 12. The court instructs the jury that if the condition of the proof in this case makes it a matter of speculation or conjecture in your minds as to what was the proximate cause of plaintiff's injury, then you must find the defendant not guilty. Given.

319 13. Even though you believe, from the evidence, that the defendant was guilty of negligence in manner and form as charged in plaintiff's declaration or one of the counts thereof, yet you are further instructed that you have no right to guess or conjecture that plaintiff's injury was caused by the negligence (if any) which you believe to be established by the evidence. Nor is the burden of proof upon the defendant to prove the manner, or account for the cause of the injury to plaintiff; and if, after a candid consideration of all the evidence in the case, the proof leaves it a matter of conjecture or speculation in your minds as to the cause of plaintiff's injury, then and in such case you must find the defendant not guilty. Given.

320 14. The law does not exact or require of a railroad company that its employes should be all the while upon their guard against dangers not reasonably to be expected, or against unusual or extraordinary occurrences or conduct on the part of others. If, under all the facts and circumstances in evidence, and the situation and surroundings which the evidence discloses, you believe from the evidence that the occurrence whereby plaintiff was injured was so unusual or so extraordinary that the occurrence was not reasonably to be anticipated by the defendant, and if you further believe from the evidence that the defendant was guilty of no negligence, then and in such case it is your duty to find the defendant not guilty. Given.

321 15. The court instructs the jury that if you believe from the evidence that the injury to the plaintiff was the result of a mere accident which occurred without negligence on the part of the defendant, then you should return a verdict of not guilty.

322 Given.

16. One of the material questions for the determination of the jury in this case is whether the plaintiff, at and just prior to the time of his injury, exercised the degree of care and caution which a person of ordinary prudence would ordinarily exercise un-

der the same or similar circumstances. If you find, from the evidence, that the plaintiff failed to exercise ordinary and reasonable care and caution for his own safety, and that solely because of such failure (if any) the injuries in question were received, then your verdict should be in favor of the defendant. If you find that the plaintiff failed to exercise ordinary and reasonable care and caution for his own safety at or just prior to the time of the injury, and that such failure on his part (if any) combined with negligence on the part of the defendant to bring about the injury and that such injury was proximately contributed to by a failure on the part of both the plaintiff and the defendant to exercise ordinary and reasonable care, then and in such case the damage sustained by plaintiff by such injury shall be diminished by the jury in proportion to the amount of negligence (if any) attributable to the plaintiff: Provided, however, that in case you find, from the evidence, that a violation of the hours of service act contributed to the injury in question, then it is your duty to hold that the plaintiff was not guilty of contributory negligence. Given.

323 17. The court further instructs the jury that they cannot return a verdict against defendant because or on account of any rough or uneven condition of the ground or track at or near the place of the accident, as there is no proof that the injuries to plaintiff were caused or contributed to by any roughness or unevenness in the ground or tracks. Given.

324 18. The court instructs the jury that railroad employes deadheading on trains and not required to perform, and not held responsible for the performance of, any service or duty in connection with the movement of the train upon which they are deadheading, are not while so dead-heading "on duty" as that phrase is used in the act regulating the hours of labor. Given.

325 19. If the jury believe from the evidence that the time when plaintiff's crew was relieved at Warwick on August 22d was 8:45 A. M., then there was, under the facts disclosed by the evidence, no violation of the Hours of Service Law, and in such case (if shown by the evidence) it is your duty to decide the issues on the basis that no violation of said Hours of Service Law has been proved. Given.

326 20. If you find, from the evidence, that the time when plaintiff's crew was relieved at Warwick on August 22nd was 8:45 A. M., and if you further find from the evidence that before leaving Cleveland on the morning of August 23rd the plaintiff knew that he was not in fit condition to exercise reasonable care for his own safety, and if you further believe from the evidence that because or on account of his then condition he failed to exercise such reasonable care at and just before the time of his injury, and that solely in consequence of such failure (if any) he received the injuries in question, in such case you should return a verdict in favor of the defendant. Given.

327 21. Your are instructed that the plaintiff cannot recover against the defendant under the first count of the declaration filed herein. Given.

328 22. You are instructed that the plaintiff cannot recover against the defendant under the third count of the declaration filed herein. Given.

To the giving of which instructions so numbered from seven to twenty-two both inclusive, the plaintiff, by his counsel, then and there duly excepted.

And thereupon at the same time, the defendant tendered to the court and asked the court to mark "Given" and to give to the jury the following instructions numbered respectively from twenty-three to twenty-eight, both inclusive, to-wit:

329 23. You are instructed that the plaintiff cannot recover against the defendant under the additional count filed herein. Refused.

24. You are instructed that the plaintiff cannot recover against the defendant under the second count of the declaration filed herein. Refused.

25. You are instructed that the plaintiff cannot recover against the defendant under the fourth count of the declaration filed herein. Refused.

26. You are instructed that the plaintiff cannot recover against the defendant under the fifth count of the declaration filed herein. Refused.

27. The court instructs the jury that there is no evidence in the case that any violation of the hours of service law proximately caused or contributed to the injuries for which this suit is brought; and you are therefore instructed that you cannot find the defendant guilty because or on account of the character or length of service in which plaintiff was engaged at and prior to his injury. Refused.

330 28. One of the material questions for the determination of the jury in this case is whether the plaintiff, at and just prior to the time of his injury, exercised the degree of care and caution which a person of ordinary prudence would ordinarily exercise under the same or similar circumstances. If you find, from the evidence, that the plaintiff failed to exercise ordinary and reasonable care and caution for his own safety, and that solely because of such failure (if any) the injuries in question were received, then your verdict should be in favor of the defendant. If you find that the plaintiff failed to exercise ordinary and reasonable care and caution for his own safety at or just prior to the time of the injury, and that such failure on his part (if any) combined with negligence on the part of the defendant to bring about the injury and that such injury was proximately contributed to by a failure on the part of both the plaintiff and the defendant to exercise ordinary and reasonable care, then and in such case the damage sustained by plaintiff by such injury shall be diminished by the jury in proportion to the amount of negligence (if any) attributable to the plaintiff. Refused.

331 But the court refused to mark said instructions, and each of them, "Given," and refused to give same to the jury.

To which action of the court in so refusing to mark said instructions, and each of them, "Given" and in refusing to give the same to the jury, the defendant, by its counsel, then and there duly excepted.

And thereupon the jury retired and later brought in their verdict signed by the twelve jurors, in favor of the plaintiff and against the defendant, in the words and figures following, to-wit:

"We, the jury, find the defendant guilty and assess the plaintiff's damages at the sum of Forty-five Thousand Dollars ($45,000)."

And thereupon the defendant, by its counsel, then and there moved the court to set aside the verdict of the jury so rendered in said cause, and to grant to the defendant a new trial of said cause.

And thereupon the court denied and overruled the defendant's said motion for a new trial and refused to grant the same; to which action of the court in so denying and overruling said motion for a new trial, the defendant, by its counsel, then and there duly excepted.

And thereupon the defendant, by its counsel, before final judgment was rendered in said cause, moved the court in arrest of judg-
332 ment; but the court denied and overruled said motion in arrest of judgment; to which action of the court in so denying and overruling said motion in arrest of judgment, the defendant, by its counsel, then and there duly excepted.

Thereupon, on to-wit: July 27, 1914, the court rendered judgment on said verdict in favor of the plaintiff and against the defendant for the sum of Forty-five Thousand Dollars ($45,000) and costs of suit.

To which action of the court in so rendering judgment on said verdict, the defendant, by its counsel, then and there duly excepted.

And thereupon the defendant prayed an appeal to the Appellate Court for the First District of Illinois, which was allowed on defendant's presenting appeal bond, to be approved by the clerk of the court, within sixty days from the date of said judgment, and presenting its bill of exceptions within ninety days from said date.

Forasmuch, therefore, as the above and foregoing matters and things do not fully appear of record, the defendant tenders this, its bill of exceptions, which contains all of the evidence heard or presented, all of the instructions given on behalf of the plaintiff, all of the instructions given and refused on behalf of the defendant, and all of the proceedings had or taken upon the trial of the above cause, and prays that the same may be signed
333 and sealed by the Honorable Oscar E. Heard, Judge of the Fifteenth Judicial Circuit of Illinois, who presided at said trial, in accordance with the statute in such case made and provided; which is done accordingly this 25th day of September, A. D. 1914.

(Signed) OSCAR E. HEARD,
[SEAL.] *Judge of the Circuit Court of Cook County Illinois.*

O. K.
(Signed.)

WEYMOUTH KIRKLAND,
C. E. STENNING,
MORSE IVES,
Attorneys for Plaintiff.

Filed Sept. 26, 10:29 A. M., 1914. John W. Rainey, Clerk. Per Gilfoil, Deputy.

334 STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of said County.

JAMES B. WILSON
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

It is hereby stipulated and agreed by and between the parties to the above-entitled — by their respective attorneys, that the above and foregoing bill of exceptions in said cause instead of a copy may be incorporated by the Clerk of the Circuit Court of Cook County, Illinois in the transcript of the record for any appeal or writ of error taken or prosecuted for the purpose of having the record of said cause reviewed upon appeal.

Dated this 22nd day of September, A. D. 1914.

(Signed) WEYMOUTH KIRKLAND,
" C. E. STENNING,
" MORSE IVES,
Attorneys for Plaintiff.

(Signed) CALHOUN, LYFORD & SHEEAN,
Attorneys for Defendant.

335 STATE OF ILLINOIS,
County of Cook, ss:

I, John W. Rainey, Clerk of the Circuit Court of Cook County, and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete transcript of the record, excepting the Bill of Exceptions, the original being incorporated herein by stipulation in a certain cause lately pending in said Court, on the law side thereof, between James B. Wilson, Plaintiff and Baltimore and Ohio Railroad Company, Defendant.

In witness whereof, I have hereunto set my hand and affixed the Seal of Said Court at Chicago, in said County, this 26th day of September, 1914.

[SEAL.] (Signed) JOHN W. RAINEY, *Clerk.*

336 *Assignment of Errors.*

Now comes the appellant, The Baltimore & Ohio Railroad Company, a corporation, by Calhoun, Lyford & Sheean, its attorneys, and assigns error upon the record, judgment and proceedings in said Circuit Court, as follows:

1. The verdict and judgment are against the law in the case.

2. The verdict and judgment are contrary to the evidence in the case.

3. The verdict and judgment are contrary to the weight of the evidence.

4. The verdict and judgment are not supported by the evidence in the case.

5. The Court admitted improper and incompetent evidence introduced by plaintiff over the objection of the defendant.

6. The court refused to exclude and strike out, on motion of defendant, improper, incompetent, irrelevant and immaterial evidence which was prejudicial to the rights and interests of the defendant.

7. The court refused to admit proper and competent evidence offered by the defendant and excluded by the court.

8. The court erred in overruling defendant's motion for a peremptory instruction to find the defendant not guilty, at the completion of plaintiff's evidence.

9. The court erred in marking "Refused" the written instruction tendered by the defendant at the completion of plaintiff's
337 evidence, accompanied by proper written motion to mark said instruction "Given" and read the same to the jury.

10. The court erred in overruling defendant's motion for a peremptory instruction to find the defendant not guilty, made at the completion of all the evidence offered on behalf of both the plaintiff and the defendant.

11. The court erred in marking "Refused" the written instruction tendered by the defendant at the completion of all the evidence on behalf of both the plaintiff and the defendant, which was accompanied by proper written motion requesting that said instruction be marked "Given" and read to the jury.

12. The court erred in refusing proper instructions asked on behalf of the defendant.

13. The court erred in marking "Given" and in giving to the jury erroneous instructions on behalf of the plaintiff.

14. Each of the instructions given on behalf of the plaintiff is improper and prejudicial to the defendant, and the court erred in giving each of said instructions to the jury.

15. The court erred in refusing to mark "Given" and in refusing to give to the jury each of the instructions tendered by the defendant.

16. There is no evidence in the record to support the verdict and judgment.

17. The court erred in overruling defendant's motion for a new trial.

338 18. The court erred in overruling defendant's motion in arrest of judgment.

19. The court erred in entering judgment on the verdict.

20. Counsel for plaintiff made improper and prejudicial remarks in the presence of the jury.

21. The verdict was manifestly the result of passion and prejudice.

22. The judgment is for an excessive amount.

23. There is a variance between the proof and the declaration and each count thereof.

THE BALTIMORE & OHIO RAILROAD COMPANY,
By CALHOUN, LYFORD & SHEEAN,
Attorneys for Appellant.

CHARLES D. CLARK,
Of Counsel.

339 *Assignment of Cross-Errors.*

1. The Circuit Court erred in denying the plaintiff (appellee) a right specifically set up and claimed by him under a statute of the United States.

2. The court erred in giving each of the instructions given by the court at the request of the defendant.

(Signed) MORSE IVES,
" WEYMOUTH KIRKLAND,
" C. E. STENNING,
Attorneys for Appellee.

Filed. Appellate Court. Oct. 9. 1914. Alfred R. Porter, Clerk.

340 At a Term of the Appellate Court, Begun and Held at Chicago, on Tuesday, the Sixth Day of October, in the Year of our Lord One Thousand Nine Hundred and Fourteen, within and for the First District of the State of Illinois.

Present Hon. Edward O. Brown, Presiding Justice.
" " William H. McSurely, Justice.
" " Frank Baker, Justice.

Alfred R. Porter, Clerk.
Michael Zimmer, Sheriff.

Court met pursuant to adjournment.
Court opened by proclamation.

And afterwards, on the 21st day of December, A. D. 1914, the following proceedings were had and entered of record in said cause, to-wit:

341 20956.

JAMES B. WILSON
vs.
BALTIMORE & OHIO R. R. Co.

Appeal from Cook Circuit.

This cause having this day been reached in the call of the docket, and counsel desiring to argue the same, and the Court, not being

fully advised in the premises, doth order that said cause be taken under advisement on abstracts filed, appellant's briefs by Jan. 27, 1915, appellee's briefs 30 days later and to be argued orally at a date to be fixed by the Court.

And afterwards, on the 26th day of January, A. D. 1915, the following proceedings were had and entered of record in said cause to-wit:

342 20956.

JAMES B. WILSON, Appellee,
vs.
THE BALTIMORE AND OHIO R. R. Co., Appellant.

Appeal Cook Circuit.

This day came appellant by it- counsel and moved the court to extend the time thirty (30) days from December 28, A. D. 1914, in which to file its abstracts and briefs in said cause and that appellee have thirty days thereafter in which to file his briefs in said cause as per affidavit and stipulation filed herein; and the Court being fully advised in the premises doth order that said time be and the same is hereby so extended.

And afterwards, on the 4th day of January A. D. 1915, the following proceedings were had and entered of record in said cause, to-wit:

343 20956.

JAMES B. WILSON, Appellee,
vs.
THE BALTIMORE AND OHIO R. R. Co., Appellant.

Appeal Cook Circuit.

This day came appellant by its counsel and moved the Court to extend the time to February 26, A. D. 1915, in which to file its abstracts and briefs in said cause and that appellee have thirty (30) days thereafter in which to file briefs in said cause as per stipulation filed herein; and the Court being fully advised in the premises doth order that said time be and the same is hereby so extended.

And afterwards, on the 1st day of February, A. D. 1915, the following proceedings were had and entered of record in said cause, to-wit:

344 No. 20956.

JAMES B. WILSON, Appellee,
vs.
THE BALTIMORE AND OHIO R. R. Co., Appellant.

Appeal Cook Circuit.

This day came appellant by its counsel and moved the Court to extend the time thirty (30) days from January 27, A. D. 1915, in which to file its briefs in said cause and that appellee have thirty (30) days thereafter in which to file briefs in said cause as per affidavit and stipulation filed herein; and the Court being fully advised in the premises doth order that said time be and the same is hereby so extended.

And afterwards, on the 22nd day of March, A. D. 1915, it being one of the days of the March Term A. D. 1915 of said Court, the following proceedings were had and entered of record in said cause, to-wit:

345 No. 20956.

JAMES B. WILSON, Appellee,
vs.
BALTIMORE & OHIO RAILROAD Co., Appellant.

Appeal Cook Circuit.

This day came appellee by his counsel and moved the Court to extend the time fifteen (15) days from and after March 26, 1915, in which to file his briefs in said cause and that appellant have fifteen (15) days thereafter in which to file reply briefs herein as per affidavit and stipulation filed herein; and the Court being fully advised in the premises doth order that said time be and the same is hereby so extended.

And afterwards, on the 30th day of March, A. D. 1915, the following proceedings were had and entered of record in said cause, to-wit:

346 No. 20956.

JAMES B. WILSON, Appellee,
vs.
BALTIMORE & OHIO RAILROAD Co., Appellant.

Appeal Cook Circuit.

It appearing by the stipulation of the parties to the above entitled cause that their is a clerical mistake as described in said stipulation in the transcript of record filed in this court in said cause;

It is hereby ordered that the said transcript of record is amended by striking from the same the word "not" as it appears before the word "know" and after the word "did" on the top line of page 12 of the transcript of the record on file in this court in said cause, so that said line shall read "did know" instead of "did not know."

It is also ordered that the appellant in said cause be given leave to amend on the face the abstracts of the record filed by it in said cause in accordance with the said amendment of the transcript above ordered.

And afterwards, on the 5th day of October, A. D. 1915, it being one of the days of the October Term A. D. 1915 of said Court, the following proceedings were had and entered of record in said cause, to-wit:

347 No. 20956.

JAMES B. WILSON, Appellee,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant.

Appeal from Cook Circuit.

On this day came again the said parties, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious, or defective; and that in the record there is no error: therefore, it is considered by the Court that the judgment aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellant its costs, by it in this behalf expended, to be taxed, and that it have execution therefor.

And afterwards, on the 7th day of October, A. D. 1915, the following proceedings were had and entered of record in said cause, to-wit:

348 *In re Publication of Written Decisions of This Court.*

It is hereby ordered that in cases the numbers and titles of which are given below the written decisions of this Court filed the 5th day of October A. D. 1915 shall be published in full in the Appellant Court Reports and that those decisions so filed which are not designated below shall be published by including an adequate abstract of such written decisions:

20956 James B. Wilson v. B. & O. R. R. Co.

And afterwards, on the 18th day of October A. D. 1915, the following proceedings were had and entered of record in said cause, to-wit:

349 20956.

JAMES B. WILSON, Appellee,
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY, Appellant.

Appeal from Circuit Court, Cook County.

The Court having considered the petition of Appellant praying for a rehearing in said cause, and being now fully advised in the premises, doth order that the prayer of said petition be and the same is hereby denied.

And afterwards, on the 25th day of October A. D. 1915, the following proceedings were had and entered of record in said cause, to-wit:

350 20956.

JAMES B. WILSON, Appellee,
vs.
BALTIMORE AND OHIO R. R. Co., Appellant.

Appeal from Circuit Court, Cook County.

The Court having considered the motion of appellant that the issuance of the mandate herein be stayed until the time for the filing of a petition in the Supreme Court of Illinois for a writ of certiorari to review the judgment of this Court in said cause shall have expired without any such petition having been filed, and if such petition for said writ shall have been filed within the proper time, then until said writ of certiorari shall have been granted or refused; and the Court, being fully advised in the premises, doth grant said motion and doth order that the issuance of the mandate in said cause be and the same is hereby stayed accordingly.

351 618-20956.

JAMES B. WILSON, Appellee,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant.

Appeal from Circuit Court, Cook County.

Mr. Presiding Justice MCSURELY delivered the opinion of the court:

Plaintiff, a conductor of one of defendant's freight trains, was severely injured while in the discharge of his duties. Upon suit

alleging negligence of the defendant he had judgment for $45,000, from which defendant has appealed.

Two grounds of liability are presented: (1) Negligent construction of defendant's tracks, the main and side tracks being placed unusually close to each other; and (2) defendant, engaged in interstate commerce, violated the federal statute by requiring plaintiff to be on duty for a longer period than sixteen consecutive hours.

Defendant has a line running southerly and easterly from Cleveland, Ohio, through Akron, where it joins what may be called the "through line" from Chicago to Pittsburg. Some distance westerly of Akron on this through line is Chicago Junction, and easterly of Akron is Newcastle Junction, and the division between these points is called the Newcastle division. The line from Akron north to Cleveland is called the Cleveland division. Plaintiff usually worked on the Newcastle division. The accident occurred in Peninsula, a station on the Cleveland division a few miles north of Akron. On the Newcastle division, plaintiff says, the usual distance between cars standing on parallel tracks was about four feet or more, and that he had never noticed this space to be less than three and
352 one-half feet in width. At Peninsula, on the Cleveland division, is a single main track and two sidings east of it. The Ohio floods in the spring of 1913 had washed out the ballast from these tracks and they had been relaid, but so close together that there would be a clearance of only one or two feet between cars on parallel tracks. A brakeman testified that to pass between an engine on one track and a car on the other it was necessary to turn sideways. Plaintiff had not noticed the distance between cars on any division other than the Newcastle division. He had run as conductor on a train through Peninsula on only one trip, but had not been there after the flood and did not know anything about the nearness of the tracks to each other at Peninsula.

About two o'clock in the morning of August 23, 1913, plaintiff was in charge of a train of forty cars arriving in Peninsula. There was a "hot box" on the east side of the eighth car from the caboose, and plaintiff undertook to set this car out of the train, and for that purpose ordered one of the engines hauling the train to back north on the sidetrack parallel to the main line and along the east side of his train. He stood upon the footboard at the rear of the engine's tender and rode on the end of the footboard next to his train as the engine backed northerly on the siding towards the car with the "hot box." He carried a lantern, but on account of the darkness did not observe any unusual distance or lack of space between the engine and the train. Before the engine reached the car the power had been shut off and it was "drifting," that is, going about five or six miles an hour, or what is described as an ordinary walk. As the engine came opposite the car with the "hot
353 box" plaintiff stepped off the footboard, apparently with the intention of uncoupling this car. The engineer saw plaintiff's lantern strike the car of the adjacent train and go out; thinking there was something wrong he stopped the engine, and plaintiff was found lying just in front of the engine. Plaintiff has no

recollection of what happened after he stepped from the footboard and did not regain consciousness for nearly three days.

The conclusion is not only reasonable but obvious, that when plaintiff stepped off his engine he was struck by the nearby car and either thrown under the engine or squeezed between it and the car. The faulty construction of the main line and the siding, with reference to the distance between them, was clearly the cause of the accident. A similar situation was characterized in the opinion in Vorhees v. Lake Shore & Michigan Southern Ry. Co., 193 Pa. St. 115, as a "dangerous man-trap." The defendant was negligent in permitting its tracks to be so close together that employees could not with reasonable safety pass between cars on adjacent tracks. Plaintiff was experienced and knew that the usual clearance between cars was sufficient for him to step off in safety. He had no reason to think the space at this point was any less than the usual distance, and the darkness furnished a reasonable excuse for his failure to notice the unusual conditions. The evidence as to negligent construction justified the verdict of the jury as to liability.

As we view this case it is hardly necessary to discuss at any length the evidence touching the question of the number of consecutive hours plaintiff was on duty prior to the accident. Whatever may be said as to the period of time commencing at 3:40 P. M. on August 19th, with reference to determining whether plain-
354 tiff was "on duty" while traveling "dead-head" to meet the train of which he was to take charge, and as to the period commencing at 3:15 P. M. on August 20th, there was submitted to the jury the question of fact as to the duration of the period of duty commencing at 4:35 P. M. August 21st. The trial court by instructions limited to this period any liability of defendant for violation of the federal statute. There is disagreement among the witnesses as to when this period of employment ended. Plaintiff says it was at 10 A. M. on August 22nd; this would make the period of duty 17 hours and 25 minutes. The defendant introduced evidence tending to show that the period ended at 8:45 A. M. We cannot say that the jury should not have believed plaintiff's version of the matter. Plaintiff sufficiently proved the violation of the statute as to this period, and there was sufficient evidence that this produced a condition of exhaustion that contributed to the accident.

There are no reversible errors in the instructions or rulings on evidence.

Are the damages excessive? Plaintiff was a young man twenty-nine years of age, in good health and of great strength and vigor. He was injured Saturday morning and was unconscious until the following Tuesday. His brain was injured, right arm amputated, back broken, vertebrae out of alignment, cartilage between the vertebrae destroyed; ribs, left clavicle and nose were broken; muscles of the entire right side have since become atrophied; right side of body partially paralyzed; both legs paralyzed; and many other injuries. Plaintiff testified that he constantly suffers excruciating pains. His average earnings as a conductor before the injury were

$125 per month. The verdict was for $45,000, which is for an amount larger than is usual in our courts. It cannot be said
355 that it is excessive solely because it is large. The real question is, is it too great compensation to a young, strong man for the experience of being transformed violently into a permanent, helpless physical wreck, with the attendant pain and suffering, past, present and future; also his loss of earnings because of permanent disability? We do not find in the record any appeal by counsel which might have unduly moved the sympathies of the jury. The amount seems to have been arrived at as the result of serious and fairminded consideration. We are not disposed to say in this instance that our judgment is better as to the amount of compensation than is that of the jury. No convincing reason appears to warrant a conclusion that the amount is excessive.

For the reasons above indicated the judgment is affirmed.

Affirmed.

356 I, James S. McInerney, Clerk of the Appellate Court of Illinois, First District, do hereby certify that the foregoing pages, numbered 1 to 339, inclusive, are a true, full and complete transcript of a certain certified transcript of the record of proceedings of the Circuit Court of Cook County, filed in the case of James B. Wilson v. The Baltimore and Ohio Railroad Company in said Appellate Court, on the 7th day of October, 1914.

I further certify that the foregoing pages Nos. 340 to 355, inclusive, are a true, full and complete transcript of the record and proceedings of said Appellate Court in the case of James B. Wilson vs. The Baltimore and Ohio Railroad Company of record in my office, and also of the opinion of said Appellate Court rendered therein, as the same now appear on file in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Appellate Court of Illinois, First District, at my office in Chicago, Illinois, this 4th day of February, 1916.

[Seal Appellate Court of the First District,
State of Illinois, July 1, 1877.]

JAMES S. McINERNEY,
Clerk Appellate Court, First District.

357 And afterwards, on the 27th day of December A. D. 1915, the following petition of plaintiff in error for writ of error was filed in said cause in words and figures following, to-wit:

358 In the Appellate Court of Illinois, First District.

Term No. 618; Gen. No. 20956.

JAMES B. WILSON, Appellee and Defendant in Error,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant and Plaintiff in Error.

Petition of Plaintiff in Error for Writ of Error.

To the Honorable William H. McSurely, Presiding Justice of the Appellate Court of Illinois, First District:

The petition of The Baltimore and Ohio Railroad Company respectfully shows:

That on April 9, 1914, the above named defendant in error, James B. Wilson, commenced an action in the Circuit Court of Cook County, Illinois, against the above named plaintiff in error.

The declaration consisted of five original counts and an additional count. All alleged the engagement of The Baltimore and Ohio Railroad Company in interstate commerce and the employment of the defendant in error as a freight conductor in such commerce. All the counts rested upon the Federal Employers' Liability Act of April 22, 1908, (35 Stat. at L., 65, Chap. 149, U. S. Comp. Stat. Sup. 1911, p. 1322) as amended April 5, 1910, (35 Stat. at L., 291, Chap. 143, U. S. Comp. Stat. Sup. 1911, p. 1324).

359 The first and third counts were taken from the consideration of the jury by peremptory instructions. Of the four remaining counts three set out in minute detail the alleged exact hours when the defendant in error, plaintiff below, went on and off duty on the 19th, 20th, 21st, 22d and 23d days of August, 1913, averring violations of the Act of Congress entitled "An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon," (34 U. S. Stat. at L., 1415, 1416, c. 2939) approved March 4, 1907, and commonly known as the Federal Hours of Service Law, so that by reason of the several violations of law by the defendant as aforesaid the plaintiff became nervous and exhausted, his senses became dulled, and his judgment impaired, and while he was in this condition, shortly after midnight, and on the 23d day of August, 1913, he was required and permitted by the defendant to take charge of a freight train bound from Cleveland, Ohio, to and through New Castle Junction, Pennsylvania; that the defendant in error, plaintiff below, took charge of said train and ran said train on said trip as far as Peninsula, Ohio, and said train was there brought to a standstill on the main track, and the defendant in error caused an engine to be detached from said train, and caused said engine to be backed upon and along a sidetrack there for the purpose of proceeding to the other end of said train and there to detach a car from said train; that said sidetrack

was next to and adjoining the said main track upon which said train was then and there standing; that as said engine backed along said sidetrack the defendant in error rode upon the footboard at the rear of the tender of said engine, and on the end of said footboard nearest said train, and that as said engine approached upon said sidetrack near to the car which the defendant in error was about to detach from said train, he then and there, by reason of the several violations of law by the plaintiff in error as aforesaid, and by
360 reason of his nervous and exhausted condition was unable to protect himself from injury there, and stepped off from said footboard of said engine toward said train and between said main track and said sidetrack, and he struck against one of the cars of said train, and was thrown against and under his engine.

One count (the second) makes no reference to "hours on duty" by the defendant in error prior to the trip upon which he was injured, and alleges negligence on the part of the plaintiff in error in having constructed said sidetrack unusually close to the main track. This count contains no averment that the plaintiff was in the exercise of ordinary care at or prior to the time of his injury.

To the above counts a plea of the general issue was filed. Upon the issues so made as above the case was tried, resulting in a verdict by the jury on July 27, 1914, for the defendant in error and against the plaintiff in error in the sum of Forty-five Thousand Dollars ($45,000). Subsequently the defendant in error's motion for a new trial was overruled, and judgment rendered upon the verdict, to all of which actions of the trial court the plaintiff in error, by its counsel, duly excepted.

At the time of his injury the defendant in error was a freight conductor in the employ of the plaintiff in error, and both were employed in interstate commerce, and governed by the provisions of the Federal Employers' Liability Act and the Federal Hours of Service Act.

The evidence showed that the defendant in error was injured at Peninsula, Ohio, about two o'clock on the morning of August 23, 1913, in the manner following: At ten o'clock on the night of August 22d he was called or notified to take a train from Cleveland to Akron. He reported for duty at Cleveland at about midnight, and left there in charge of the train in question at 12:30 A. M. August 23d. A stop was made at Peninsula to take water.
361 At this station a single main track runs north and south, and immediately east of and parallel thereto are two sidetracks. Defendant in error decided that it was necessary at this place to set out from his train a car having a hot box, which car was about eight cars from the caboose. After the engines had taken water, one of same was detached, and proceeded, backing, north upon the siding just east of the main track. The defendant in error and his head brakeman were on the running or foot-board at the rear of the tender of this backing engine. The defendant in error stood on the west end of the running-board, or on the side toward the main track, upon which was the standing train.

Defendant in error testified that immediately preceding the in-

jury he was "awfully sleepy and tired" at the time of riding on the footboard; that he stood upon the west end of the footboard next to the main track until the engine arrived at the place where the hot box car was, and that he there got off the footboard between the engine and the car of the train. What happened after that he did not remember. Defendant in error testified that he did not give any signal as to the speed at which the engine should be operated, or give any signal whatever before he stepped off. The engineer, concluding from the motion of the lantern carried by defendant in error, that he had made some mismove, stopped his engine when the defendant in error was just at the front thereof.

The defendant in error, plaintiff below, gave much detailed testimony as to the times when he had been called for work on different dates previous to his injury, and commencing with August 19th—just what runs he made—when and where he was relieved—just what he did while "off duty," as well as while "on duty"—what parts of compensated time was made up of "dead-heading," i. e. riding as a passenger when he had no responsibility in connection with the operation of the train.

362 The undisputed evidence showed that the defendant in error, plaintiff below, was last relieved before the time of his injuries, at Warwick, Ohio, on the morning of August 22d, either at 8:45 A. M. or at 10 A. M. The evidence is undisputed that he did not again go upon duty until after the lapse of more than ten consecutive hours from the time of his relief at Warwick. Notwithstanding the uncontroverted fact, that for at least fourteen hours before going on duty on the trip on which he was injured the defendant in error was not "engaged in or connected with the movement of any train" the court, by its first instruction, permitted the jury to speculate or conjecture as to whether there was a proximate connection between the period of service terminating not later than 10 A. M. on August 22d and another period which began fourteen hours thereafter.

Within due time the plaintiff in error duly appealed said cause to the Appellate Court of Illinois, First District, and thereafter, on October 5, 1915, said Appellate Court of Illinois, First District, entered its order affirming the judgment in the sum of Forty-five Thousand Dollars ($45,000), theretofore entered against your petitioner in said Circuit Court of Cook County, Illinois.

Subsequently, and within due time, as required by law, this plaintiff in error filed its petition in said Appellate Court of Illinois, First District, for a rehearing, which petition was denied by said court on October 14th, 1915.

Said Appellate Court of Illinois, First District, is the highest court in the State of Illinois in which a decision of said cause could be had.

Your petitioner, The Baltimore and Ohio Railroad Company, subsequently to the refusal of said Appellate Court of Illinois, First District, to grant a rehearing herein, filed its petition in the Supreme Court of Illinois for a writ of certiorari to said Appellate

363 Court of Illinois, First District, praying that said Supreme Court of Illinois should direct that the record in said Ap-

pellate Court of Illinois, First District, should be certified to said Supreme Court of Illinois for its review and determination a copy of which is hereto attached and made a part hereof; but that said Supreme Court of Illinois, on December 21, 1915, by its order duly entered, overruled the prayer of this petitioner, and denied the said writ of certiorari, and thereby the Appellate Court of Illinois, First District became and was the highest court in the State of Illinois in which a final decision could be had herein.

Said Appellate Court of Illinois, First District, erred in affirming the said judgment of the Circuit Court of Cook County, and erred in not reversing said judgment of said Circuit Court of Cook County, and ordering a new trial.

The record herein raises and presents Federal questions in said cause, viz:

364 I.

May a railroad trainman engaged in interstate commerce, and injured by reason of his exhausted condition brought about by his having on a previous occasion been permitted or compelled by his employer to be and remain on duty in violation of the Federal Hours of Service Act, where such exhausted condition was known to him, but unknown to his employer, recover for such injuries, if at the time of the receiving of same his being on duty was not a violation of said act?

II.

May a railroad trainman engaged in interstate commerce, and who at the time of the receipt of his injuries has been compelled to or permitted to be and remain on duty in violation of the terms and provisions of the Federal Hours of Service Act, recover for such injuries solely upon the ground of the violation of such act, unless it shall further appear that such violation proximately contributed to bring about the injuries in question?

III.

May a railroad company engaged in interstate commerce require a trainman also engaged in interstate commerce, and who has been compelled or permitted to remain on duty in such service continuously for more than sixteen hours, to go again upon duty after his having had at last ten consecutive hours off duty; provided any disability to which said trainman may then be subject by reason of having on the previous trip been on duty more than sixteen hours continuously, is unknown to his employer?

IV.

In a suit brought by a trainman engaged in interstate commerce to recover for injuries alleged to have been received by reason of his exhausted condition brought about by reason of his having been

compelled or permitted, on a previous trip to be and remain
365 continuously on duty more than sixteen hours, may the court submit to a jury the question of whether such exhausted condition proximately contributed to bring about such injuries, where it also appears that such condition was unknown to the employer, and the plaintiff had since the previous trip, during which said violation occurred, been given by the employer at least ten consecutive hours off duty?

V.

In a suit brought by a trainman engaged in interstate commerce to recover for injuries alleged to have been caused by reason of his exhausted condition, brought about by his having on a previous trip been permitted to or compelled to be and remain continuously on duty for more than sixteen hours, may the court submit to the jury the question of whether a definite period of ten or more consecutive hours off duty was or was not a sufficient length of time to in fact break the causal connection between the antecedent period of overwork and the subsequent injury, where the employer had no knowlede of the employe's exhausted condition when resuming work at the end of said definite period?

366 Your petitioner further shows that in the above-entitled action certain rights, privileges and immunities under the Constitution of the United States, and certain rights, privileges and immunities under certain statutes of the United States were specially set up and claimed by your petitioner, and that the Federal questions hereinabove enumerated were made in said case, and that the decision of said court in said action was against the rights, privileges and immunities so specially set up and claimed by your said petitioner, and that a decision of the above Federal questions is necessary to the judgment rendered.

Wherefore, your petitioner prays the allowance of a writ of error to the Appellate Court of Illinois, First District, and that the same may be allowed to bring up for review before the Supreme Court of the United States the said order and judgment of said Appellate Court of Illinois, First District; that a citation be granted and issued directed to the said James B. Wilson, defendant in error; that the bond herewith presented be approved; and that upon compliance with the terms of the statute in such case made and provided said bond and writ of error may operate as a supersedeas; that the errors complained of may be reviewed in the Supreme Court of the United States, and the judgment of said Appellate Court of Illinois, First District, be reviewed, and that your petitioner may have such other and further relief in the premises as may be just.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By CALHOUN, LYFORD & SHEEAN, *Its Attorneys.*

The writ of error as prayed for in the foregoing petition is hereby allowed, this 27th day of December A. D. 1915. The writ of error to

operate as a supersedeas, and bond for that purpose is fixed at the sum of Fifty-five Thousand Dollars.

WILLIAM H. McSURELY,
Presiding Justice of the Appellate Court of Illinois, First District.

367 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court Begun and Held at Springfield on Tuesday, the Seventh Day of December, in the Year of our Lord One Thousand Nine Hundred and Fifteen, Within and for the State of Illinois.

Present: The Honorable William M. Farmer, Chief Justice; Honorable James H. Cartwright, Justice; Honorable Orrin N. Carter, Justice; Honorable Frank K. Dunn, Justice; Honorable William M. Farmer, Justice; Honorable Charles C. Craig, Justice; Honorable Warren W. Duncan, Justice.

Patrick J. Lucey, Attorney General.

Warren C. Murray, Marshal.

Attest:
CHARLES W. VAIL, *Clerk.*

Be it remembered, that to-wit: on the 21st day of December A. D. 1915, the same being one of the days of the said December term of said Supreme Court, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

December 21, A. D. 1915.

No. 10500.

BALTIMORE & OHIO RAILROAD COMPANY, Petitioner,
v.
JAMES B. WILSON, Respondent

Certiorari to First District.

And now on this day the Court having duly considered the petition for a Writ of Certiorari herein as well as the record, abstract, brief and argument filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a writ of Certiorari herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by him in this behalf expended, to be taxed, and that he have execution therefor.

I, Charles W. Vail, Clerk of the Supreme Court of the State of Illinois, and keeper of records, files and seal thereof, do hereby certify that the foregoing is a true copy of the final order of the

said Supreme Court in the above entitled cause of record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said Supreme Court at Springfield, in said State, this 22nd day of December, in the year of our Lord one thousand nine hundred and Flfteen.

Seal of the Supreme Court, State of Illinois.

CHAS. W. VAIL. *Clerk of the Supreme Court.*

368 No. —.

In the Supreme Court of Illinois, October Term, A. D. 1915.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Petitioner,
vs.
JAMES B. WILSON, Respondent.

Petition for Writ of Certiorari to Appellate Court, First District.

Heard There on Appeal from Circuit Court, Cook County.

Hon. Oscar E. Heard, Judge, Presiding.

Petition.

William J. Calhoun, Will H. Lyford, James M. Sheean, Charles D. Clark, Attorneys for Petitioner.

368[1] In the Supreme Court of Illinois, October Term, A. D. 1915.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Petitioner,
vs.
JAMES B. WILSON, Respondent.

Petition for Writ of Certiorari to Appellate Court, First District.

Heard There on Appeal from Circuit Court, Cook County.

Hon. Oscar E. Heard, Judge, Presiding.

Petition.

To the Honorable Judges of the Supreme Court of the State of Illinois.

Your petitioner, the Baltimore and Ohio Railroad Company, shows that on the 5th day of October, 1915, the Appellate Court of Illinois for the First District, entered its certain order affirming a judgment in the sum of Forty-five Thousand Dollars theretofore entered against your petitioner in a certain cause brought in the Circuit Court of Cook County, entitled, "James B. Wilson v. The Baltimore and Ohio Rail-

road Company," and duly appealed in accordance with the statute in such case made and provided, from said Circuit Court of Cook County, to said Appellate Court; that thereafter on, to-wit the 25th day of October, 1915, your petitioner, being appellant in said
368[2] cause then pending in said Appellate Court, moved said Appellate Court to stay the issuance of a mandate until the time for the filing of a petition in this court for a writ of certiorari to review the judgment of said Appellate Court should have expired without any such petition having been filed, and if such petition shall have been filed within the proper time, then until such writ of certiorari shall have been granted or refused; and said Appellate Court granted said motion and entered its order that the mandate in this cause be stayed accordingly.

Your petitioner now prays that said cause entitled "James B. Wilson, Appellee, vs. The Baltimore and Ohio Railroad Company, Appellant," now pending as aforesaid in said Appellate Court, First District, as General Number 20956 therein, shall be certified to this court for its review and determination, and in support of this petition herewith sets forth a concise statement of the case here involved, the points and authorities relied upon by your petitioner, and also accompanies this petition with a copy of the opinion of said Appellate Court.

Particularly your petitioner shows unto this court that a writ of certiorari ought to be granted herein in order that there may be an authoritative adjudication as to the law concerning the facts about which there is little or no dispute and upon which this petitioner has been held liable herein in the sum of Forty-five Thousand Dollars ($45,000); and that such authoritative adjudication necessarily involves decision of the question:

Is the petitioner shielded from responsibility by a proper application to undisputed facts of the Federal Hours of Service Act, approved March 4, 1907, entitled, "An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon"—Chap, 2939, 34 Stat. at L., 1415, U. S. Comp. Stat. Supp. 1911, p. 1321?

368[3] *Statement.*

For the purpose of enabling the court to pass intelligently on the question whether petitioner should have the right to be heard in this court, we think it unnecessary to analyze the different counts of the declaration, or the details of the proof, or to direct the attention of the court in this petition to aught except the pivotal proposition which we ask leave to elaborate by brief and argument upon the granting of the writ prayed for.

The declaration (Abst., 1-16) consists of five original counts and an additional count (Abst., 16-19). All allege the engagement of defendant in interstate commerce, and the employment of the plaintiff by defendant as a freight conductor in such commerce. All the counts rest upon the Federal Employe-s' Liability Act of April 22, 1908 (35 Stat. at L. 65, Chap. 149, U. S. Comp. Stat. Supp., 1911,

p. 1322), as amended April 5, 1910 (35 Stat. at L. 291, Chap. 143, U. S. Comp. Stat. Supp., 1911, p. 1324).

The first and third counts were taken from the consideration of the jury by peremptory instructions (Abst., 116). Of the four remaining counts, three set out in minute detail the alleged exact hours when plaintiff went on and off duty on the 19th, 20th, 21st, 22d and 23d days of August, 1913, averring violation of the Federal Hours of Service law, "so that (Abst., 17), by reason of the several violations of law by the defendant as aforesaid, the plaintiff became nervous and exhausted, his senses became dulled and his judgment impaired, and while he was in this condition shortly after midnight, and on the 23d day of August, 1913, he was required and permitted by the defendant to take charge of a freight train bound from Cleveland, Ohio, to and through New Castle Junction, Pennsylvania, and the plaintiff took charge of said train and ran said train
368[4] on said trip as far as Peninsula, Ohio, and said train was there brought to a standstill upon the main track there, and the plaintiff caused an engine to be detached from said train, and caused said engine to back in and along a sidetrack there for the purpose of proceeding to the other end of said train and for the purpose of detaching a car from said train; that said sidetrack was next to and adjoining the said main track upon which said train was then and there standing; that as said engine backed along said sidetrack the plaintiff rode upon the footboard at the rear of the tender of said engine and on the end of said footboard nearest the said train, and that as said engine approached upon said sidetrack near to the car of said train which the plaintiff was about to detach therefrom, the plaintiff then and there, by reason of the several violations of law of the defendant aforesaid, and by reason of his nervous and exhausted condition as aforesaid, was unable to protect himself from injury there, and he stepped off from said footboard of said engine towards said train and between said main track and said sidetrack, and he then and there struck against one of the cars of said train and was thrown against and under said moving engine," etc.

One count (the second) makes no reference to "hours on duty" by plaintiff antecedent to the trip on which he was injured, and alleged negligence on the part of the defendant "in constructing a certain sidetrack there unusually close to said main track." This count, however, contains no averment that plaintiff was in the exercise of ordinary care at or prior to the time of his injury, and even under this count the true meaning of the Hours of Service Act is necessarily involved, because the omission from this count of any averment of the exercise of care by plaintiff must be considered in connection with
plaintiff's first instruction (Abst., 106, 107) that the jury
368[5] should not consider plaintiff's contributory negligence on the morning of August 23, either to defeat or to diminish damages, if the jury found that a violation of the Hours of Service Act "from a time during the afternoon of August 21, 1913, until a time in the forenoon of August 22, 1913," proximately contributed to the accident on the morning of August 23.

We make the foregoing brief summary of the pleadings in order

to get before the court our first proposition, viz.: that there is inevitably involved in the case the meaning and effect of the Hours of Service Act. Possibly even this brief summary of the pleadings is unnecessary to establish this first proposition, inasmuch as defendant tendered and the court refused the following instruction (Abst., 117):

28. "The court instructs the jury that there is no evidence in the case that any violation of the Hours of Service law proximately caused or contributed to the injuries for which this suit is brought; and you are therefore instructed that you cannot find the defendant guilty because or on account of the character or length of service in which plaintiff was engaged at and prior to his injury."

Then, too, if the facts hereinafter recited show that the number of hours on duty contributed to the injury, we take it that the defendant has the right, without special pleading, to invoke the Hours of Service Act as the sole "rule of reason" by which to measure the protection, as well as the liability, which that act extends to interstate carriers.

Flynn v. Chicago City Railway Co., 250 Ill. 460.

The Facts.

At the time of his injury, plaintiff was a freight conductor in the employ of defendant, and both he and defendant were governed by the provisions of the above stated Employers' Liability and
368[s] Hours of Service Acts. He was injured at Peninsula, Ohio (a station on the Cleveland Division of defendant, between Cleveland and Akron), at about two o'clock on the morning of August 23, 1913, in the manner following: At ten o'clock on the night of August 22 he was "called" or notified to take a train from Cleveland to Akron. He reported for duty at Cleveland at about midnight and left this terminal point in charge of his train at 12:30 A. M., August 23. When three or four miles from Peninsula plaintiff discovered two hot boxes in his train, which was drawn by two engines, and consisted of forty cars and a caboose. A stop was made at Peninsula to take water. At this station a single main track runs north and south, and immediately east of and parallel with the main track are two side tracks, built twelve foot center to center. Plaintiff decided it was necessary to set out the hot box car, which was about eight cars from the caboose, and when the engines had taken water, the train was pulled ahead (south) on the main track a sufficient distance so that the caboose cleared the north switch connecting the main track with the siding. The second engine (between which and the head engine there were five cars), then went onto the siding at its south end and proceeded to back north on such passing siding, just east of the main track, upon which there was then standing the rear thirty-five cars and the caboose. Plaintiff and his head brakeman rode on the running board or foot board at the rear of the tank of this engine as it backed north. Plaintiff stood at the west end of the running board or on the side toward the standing train.

Plaintiff's description of his condition immediately preceding his injury is as follows:

"I was awful sleepy and tired when riding north on that running board. My attention was called to my condition
368[7] at that time by the fact that I could see the green tail light on the rear end of the caboose. From the direction I was looking at it, it looked like two lights, staggery like, like two lights, and I knew there was only one. My eyes seemed blurred. I felt like I could lay right down on that foot board and go to sleep. (Abst., 33.)

When I was standing on the west end of that running board and arrived at the place where the car was with the hot box, I got off the engine foot board, in between the engine and the car of the train. What happened after that I don't remember; the last thing that I remember is stepping off the foot board. (Abst., 34.)

From the time I got upon this foot board until I stepped off, I did not give any signal with my lantern as to the speed at which the engine operated down there; I gave no signal to the engineer from the time I started until after the accident. * * * I do not recall whether or not I put my lantern out on the side toward the (Abst., 46) train or on the side toward the ground, before I stepped off, but I am sure that I gave no slow signal, no stop signal, no signal of any kind. (Abst., 47.)

I don't remember whether or not I struck the side of this car; I know I did not slip or stumble off the foot board; I don't remember after that; I don't know whether both feet had left the foot board at the time that I last remember what took place. My last recollection is at the time I stepped down off the foot board with my left foot; I have no recollection whether that foot ever reached the ground; at that time I don't remember whether I had my lantern in my right or left hand. Whether or not I fell asleep at that time, I don't know." (Abst., 48.)

Engineer Miller, operating the engine on whose foot board plaintiff was riding and being on the same side of the engine as plaintiff, all at once (Abst., 91-92) saw plaintiff's lantern and plaintiff himself get off—it seemed that he made some mismove—his lantern went against the car on the opposite track, and went on. Plaintiff having given no signal of any kind to slacken up or stop, Miller
368[8] thought there was something wrong and stopped the engine, and when it stopped, plaintiff was just at the front of the engine. (Abst., 92.)

Plaintiff's condition at the time he responded to the call to take charge of the train on which he was injured is described by himself as follows:

"I was busy (Abst., 31) from the time I was called until my train left, and I was also awful sleepy and tired. When I was coming from the caboose down to the yard office, the head brakeman and I were walking along between the tracks, between the train I had in there and another one that they had brought in later, and we were walking along there and I stumbled and bumped into the side of a car in the train I brought in, and it woke me up; I had been dozing and walking along there.

After I left Cleveland, I was trying to copy the numbers of the cars off the book onto the wheel report, and when I would look down at the book to get the numbers, it looked as though there was two numbers; I couldn't get them, it was double. I had an order to meet an extra train coming in the opposite direction and I knew I didn't dare to sit there or I would go to sleep; I had to keep awake. (Abst., 32.) I could not finish filling out my report; I started to do so and I couldn't keep awake and I went out on the rear platform of the caboose, and rode to Peninsula.

On the night I was called (Abst., 44) and while on my way down to the yard office and before I had registered or taken out any train at all, I bumped up against or run into the sides of the cars. When I got to the yard office, I saw the yardmaster and the clerk, but (Abst., 45) I did not say anything to either of them about the fact that I was sleepy; I did not say anything to either of them that I had found myself staggering and bumping against cars on the way down; I told them nothing about feeling tired and sleepy or about having stumbled."

A considerable portion of the record is taken up with a detailed recital of the plaintiff's work from August 19 to the date of the accident, just when he was called on different dates—just what
368[9] runs he made—just when and where he was relieved—just what he did while "off duty" as well as while "on duty" during this period—what part of his compensated time was made up of "dead-heading," i. e., riding as a passenger when he had no responsibility in connection with the operation of the train.

This detail, we think, can only be appropriately set out in a brief (if leave to file brief is given by the granting of the writ as prayed), and cannot be material upon this application for the reason that the court below adopted as the law Conference Rule 74 of the Interstate Commerce Commission (approved by the Kentucky Court of Appeals in Osborne, Admr. v. C., N. O. & T. P. Ry., 164 S. W. Rep. 818) and gave the following instruction:

18. "The court instructs the jury that railroad employes deadheading on trains and not required to perform, and not held responsible for the performance of any service or duty in connection with the movement of the train upon which they are deadheading, are not while so deadheading 'on duty' as that phrase is used in the act regulating the hours of labor."

Under this interpretation the only possible violation of the Hours of Service Act that could be claimed in the entire period from August 19 to the time of the accident was the trip terminating at Warwick on the morning of August 22. The plaintiff was admittedly relieved at Warwick on the morning of August 22, and admittedly did not again go on duty until midnight. Plaintiff recorded in his time-book the time of his relief at Warwick as 8:45 A. M. The engineer who was relieved with plaintiff fixed the time of relief at 8:45 A. M. (Abst., 97.) The conductor who relieved him testified to 8:45 as the hour of relief, and produced his orignal entry made at the
368[10] time (Abst., 99.) The train-sheets of the defendant company made up by the train dispatcher from telegraphic

reports, also show the hour of relief as 8:45 A. M. If, in fact, Wilson was relieved at 8:45, such relief was given before the expiration of sixten hours, as the time at which he had reported for duty on this trip was 5:30 P. M. of the preceding day. Wilson, however, testified that the entry which he made in his book and the report which he made to the Company as to the time of his relief was false, and that he was not actually relieved until 10:00 A. M. on the morning of August 22, or sixteen hours and thirty minutes from the time he reported for duty on the 21st.

There is no controversy in the record that after the time he was relieved at Warwick on the morning of August 22 (whether that relief was at 8:45 or 10:00 A. M.), Wilson was not again (in the language of the Hours of Service Act), "engaged in or connected with the movement of any train" until he reported about midnight and took charge of the train which left Cleveland at 12:30 the morning of August 23—that is, no matter whether the relief was before or after the expiration of sixteen continuous hours on duty, Wilson was (again in the language of the Act) "relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty."

But notwithstanding the uncontroverted fact that for at least fourteen hours before going on duty on the trip on which he was injured, Wilson was not "engaged in or connected with the movement of any train," the court, by its first instruction (Abst., 106, 107) permitted the jury to speculate or conjecture whether there was proximate connection between a period of service terminating not later than 10:00 A. M. on August 22, and another period which began fourteen hours thereafter.

368[11] *Points and Authorities.*

I.

Plaintiff's disability to perform the duties of his dangerous occupation with a degree of care commensurate with the hazards of that occupation, and which disability was known to him and not communicated to his employer, defeats recovery, unless at the time of his injury the very fact of his then being on duty was a violation of the Hours of Service Act.

In Schweig v. C., M. & St. P. Ry. Co., 216 Federal Rep. 750, the Circuit Court of Appeals for the Eighth Circuit held (752):

"Plaintiff in error claims that Schweig fell from the engine by reason of being in a tired and exhausted condition, although there is no direct evidence that this was so, and it is very doubtful whether there was sufficient evidence to go to the jury upon this subject. (St. L., I. M. & S. Ry. Co. v. McWhirter, 229 U. S. 265, 33 Sup. Ct., 858; 57 Law Ed., 1179); but we do not determine this question. Looking at the case as presented by the record, regardless of the Hours of Service Act, and treating the case simply as one under the Employers' Liability Law (35 Stat., 65), it is clear that Schweig as-

sumed the risk of injury by reason of the continuous hours of service, as he knew better than anybody else his own condition, and as to whether he was taking any risks in continuing to work in his then present condition, whatever it was. Therefore the verdict was rightly directed on this view of the case."

In Smith v. A., T. & S. F. Ry. Co., 87 S. W. Rep., 1052 (1057), The Court of Appeals of Texas held:

"He knew his physical condition far better than the railway Company could know it, and cannot excuse his carelessness
368[12] in falling asleep on his engine while it was standing on the main track by the fact that he was requested by the master mechanic to take out a train after he had been at work for about seventeen hours."

II.

By the Hours of Service Act Congress has legislatively determined the boundaries of the Employers' Liability for injuries caused by permitting employees to be on duty an excessive number of hours.

This proposition permits of no debate since the decision of this court in Staley v. I. C. R. R. Co., 268 Ill., 356, in which, after having "referred to and commented on practically every decision of the United States Supreme Court bearing upon this question," the conclusion is announced (377):

"The Federal Employers' Liability act has taken possession of—has occupied—that field for the purpose of calling into play therein this exclusive power. Necessarily, all common or statute law of this State on that subject has been superseded. The field of liability as to employees injured while engaged in interstate commerce on railroads is occupied exclusively by the Federal Employers' Liability act,—and that, too, regardless of the negligence or lack of negligence of either party to the litigation."

368[13] III.

Under that act, as authoritatively interpreted by the United States Supreme Court, a proximate relationship must be established between the injury and the violation of the law, even where at the time of the injury the very fact of claimant being then on duty is violative of the law.

In St. L., I. M. & S. Ry. Co. v. McWhirter, 229 U. S., 265; 57 Law. Ed., 1179, the Supreme Court, speaking through Chief Justice White, said:

"The Hours of Service Act was approved March 4, 1907, and is entitled "An Act to Promote the Safety of Employees and Travelers Upon Railroads by Limiting the Hours of Service of Employees Thereon." We are unable to discover in the text of the Statute any support for the conclusion that it was the purpose of Congress in adopting it to subject carriers to the extreme liability of insurers, which the view taken of the act by the court below imposes. We say

this, because, although the act carefully provides punishment for a violation of its provisions, nowhere does it intimate that there was a purpose to subject the carrier who allowed its employees to work beyond the statutory time to liability for all accidents happening during such period, without reference to whether the accident was attributable to the act of working overtime. And we think that where so such liability is expressed in the statute, it cannot be supplied by implication. It requires no reasoning to demonstrate that the general rule is that, where negligence is charged to justify a recovery, it must be shown that the alleged negligence was the proximate cause of the damage."

368[14] IV.

By the act Congress has also legislatively determined that even when and employee has been on duty an excessive length of time, viz., for more than sixteen consecutive hours, the employer may legally (and therefore without liability) permit such employee to resume duty after the expiration of ten hours off duty.

V.

By instruction 1 the court below permitted the jury (and the jury exercised the permission given), to overrule the legislatively declared judgment of Congress that ten hours "off duty" is a legally sufficient intervention to break the causal connection between previous overwork and subsequent injury.

VI.

That neither courts nor juries have the right to enlarge upon or to take from any of the provisions of the Hours of Service Law, or to decide that ten hours "off duty" does not, in fact, break the causal relationship between antecedent overwork and subsequent injury, would seem established by the fact that even State legislatures have no such right, although claimed as an exercise of police power.

In Erie Railroad Company v. New York, 233 U. S., 671; 58 Law Ed., 1149, the question involved was whether the State of New York by legislative enactment could prescribe a different day's work for block system, telegraph and telephone operators and signal
368[15] men on railroads then the house prescribed by the act of March 4, 1907, known as the Federal Hours of Service Act. The court held that the act of March 4, 1907, had completely covered the whole field relating to hours of labor of railway employees concerned with the movement of trains, and that the rights as well as the duties and responsibilities of carriers subject to that act must be found within the four corners of the act itself. The court says (683):

"Regulation is not intended to be a mere wanton exercise of power. It is a restriction upon the management of the railroads.

It is induced by the public interest or safety, and the 'hours of service' law of March 4, 1907, *is the judgment of Congress of the extent of the restriction necessary.* (Italics ours.) It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety, and of the cost and burden which the railroad must endure to secure it."

VII.

The appellate court erred in holding that "it is hardly necessary to discuss at any length the evidence touching the question of the number of consecutive hours plaintiff was on duty prior to the accident."

There being no question that "a condition of exhaustion contributed to the accident" (Appellate Court opinion), the defendant was entitled to a peremptory instruction, if the evidence showed that this contributing cause arose notwithstanding compliance by defendant with the rules laid down by Congress concerning hours of service. As this law penalizes those who disobey, so it must protect those who give obedience. Furthermore, plaintiff's instructions 1, 2 and 5 specifically invoked the Hours of Service law under every
368[16] count of the declaration, not merely to deprive the defendant of assumed risk or contributory negligence as a defense, but even in the diminution of damages. Construction or interpretation of the Federal act is essential to a correct decision.

We most respectfully suggest that on such an important question as the proper construction or interpretation of this important Federal law, we are entitled to a decision; and to the end that such decision may be obtained, your petitioner prays that a writ of certiorari be granted.

All of which is respectfully submitted.

WILLIAM J. CALHOUN,
WILL H. LYFORD,
JAMES M. SHEEAN,
CHARLES D. CLARK,
Attorneys for Petitioner.

368[17] APPENDIX.

Opinion of the Appellate Court.

Plaintiff, a conductor of one of defendant's freight trains, was severely injured while in the discharge of his duties. Upon suit alleging negligence of the defendant he had judgment for $45,000, from which defendant has appealed.

Two grounds of liability are presented: (1) negligent construction of defendant's tracks, the main and side tracks being placed unusually close to each other; and (2) defendant, engaged in interstate commerce, violated the Federal statute by requiring plaintiff to be on duty for a longer period than sixteen consecutive hours.

Defendant has a line running southerly and easterly from Cleveland, Ohio, through Akron, where it joins what may be called the "through line" from Chicago to Pittsburg. Some distance westerly of Akron on this through line is Chicago Junction, and easterly of Akron is Newcastle Junction, and the division between these points is called the Newcastle division. The line from Akron north to Cleveland is called the Cleveland division. Plaintiff usually worked on the Newcastle division. The accident occurred at Peninsula, a station on the Cleveland division a few miles north of Akron. On the Newcastle division, plaintiff says, the usual distance between cars standing on parallel tracks was about four feet or more, and that he had never noticed this space to be less than three and one-half feet in width. At Peninsula, on the Cleveland division, is a single main track and two sidings east of it. The Ohio floods in the spring of 1913 had washed out the ballast from these tracks and they had been relaid, but so close together that there would be a clear-
368[18] ance of only one or two feet between cars on parallel tracks.

A brakeman testified that to pass between an engine on one track and a car on the other it was necessary to turn sideways. Plaintiff had not noticed the distance between cars on any division other than the Newcastle division. He had run as conductor on a train through Peninsula on only one trip, but had not been there after the flood and did not know anything about the nearness of the tracks to each other at Peninsula.

About two o'clock in the morning of August 23, 1913, plaintiff was in charge of a train of forty cars arriving in Peninsula. There was a "hot box" on the east side of the eighth car from the caboose, and plaintiff undertook to set this car out of the train, and for that purpose ordered one of the engines hauling the train to back north on the sidetrack parallel to the main line and along the east side of his train. He stood upon the footboard at the rear of the engine's tender and rode on the end of the foot board next to his train as the engine backed northerly on the siding towards the car with the "hot box." He carried a lantern, but on account of the darkness did not observe any unusual distance or lack of space between the engine and the train. Before the engine reached the car the power had been shut off and it was "drifting," that is, going about five or six miles an hour, or what is described as an ordinary walk. As the engine came opposite the car with the "hot box" plaintiff stepped off the foot board, apparently with the intention of uncoupling this car. The engineer saw plaintiff's lantern strike the car of the adjacent train and go out; thinking there was something wrong he stopped the engine, and plaintiff was found lying just in front of the engine. Plaintiff has no recollection of what happened
368[19] after he stepped from the foot board and did not regain consciousness for nearly three days.

The conclusion is not only reasonable but obvious, that when plaintiff stepped off his engine he was struck by the nearby car and either thrown under the engine or squeezed between it and the car. The faulty construction of the main line and the [illegible]ling, with refer-

ence to the distance between them, was clearly the cause of the accident. A similar situation was characterized in the opinion in Vorhees v. Lake Shore & Michigan Southern Ry. Co., 193 Pa. St., 115, as a "dangerous man-trap." The defendant was negligent in permitting its tracks to be so close together that employees could not with reasonable safety pass between cars on adjacent tracks. Plaintiff was experienced and knew that the usual clearance between cars was sufficient for him to step off in safety. He had no reason to think the space at this point was any less than the usual distance, and the darkness furnished a reasonable excuse for his failure to notice the unusual conditions. The evidence as to negligent construction justified the verdict of the jury as to liability.

As we view this case it is hardly necessary to discuss at any length the evidence touching the question of the number of consecutive hours plaintiff was on duty prior to the accident. Whatever may be said as to the period of time commencing at 3:40 P. M. on August 19th, with reference to determining whether plaintiff was "on duty" while traveling "dead-head" to meet the train of which he was to take charge, and as to the period commencing at 3:15 P. M. on August 20th, there was submitted to the jury the question of fact as to the duration of the period of duty commencing at 4:35 P. M., August 21st. The trial court by instructions limited to this period any liability of defendant for violation of the Federal 368[20] statute. There is disagreement among the witnesses as to when this period of employment ended. Plaintiff says it was at 10 A. M. on August 22nd; this would make the period of duty 17 hours and 25 minutes. The defendant introduced evidence tending to show that the period ended at 8:45 A. M. We cannot say that the jury should not have believed plaintiff's version of the matter. Plaintiff sufficiently proved the violation of the statute as to this period, and there was sufficient evidence that this produced a condition of exhaustion that contributed to the accident.

There are no reversible errors in the instructions or rulings on evidence.

Are the damages excessive? Plaintiff was a young man twenty-nine years of age, in good health and of great strength and vigor. He was injured Saturday morning and was unconscious until the following Tuesday. His brain was injured, right arm amputated, back broken, vertebræ out of alignment, cartilage between the vertebræ destroyed; ribs, left clavicle and nose were broken; muscles of the entire right side have since become atrophied; right side of body partially paralyzed; both legs paralyzed; and many other injuries. Plaintiff testified that he constantly suffers excruciating pains. His average earnings as a conductor before the injury were $125 per month. The verdict was for $45,000, which is for an amount larger than is usual in our courts. It cannot be said that it is excessive solely because it is large. The real question is, is it too great compensation to a young, strong man for the experience of being transformed violently into a permanent, helpless physical wreck, with the attendant pain and suffering, past, present and future; also

his loss of earnings because of permanent disability? We do not find in the record any appeal by counsel which might have un-
368[21] duly moved the sympathies of the jury. The amount seems to have been arrived at as the result of serious and fairminded consideration. We are not disposed to say in this instance that our judgment is better as to the amount of compensation than is that of the jury. No convincing reason appears to warrant a conclusion that the amount is excessive.

For the reasons above indicated the judgment is affirmed.

Affirmed.

[Endorsed:] Gen. No. 20,956. Term No. 618. Appellate Court. James B. Wilson, Appellee & Defendant in Error, vs. The Baltimore & Ohio Railroad Co., Appellant & Plaintiff in Error. Petition for Writ of Error. Calhoun, Lyford & Sheean, "The Rookery," Chicago. Filed Appellate Court, Dec. 27, 1915. James S. McInerney, Clerk.

369 And afterwards, on the same day, to-wit: the 27th day of December A. D. 1915, the following assignment of errors was filed in said cause in words and figures following, to-wit:

370 In the Appellate Court of Illinois, First District.

Gen. No. 20956.

JAMES B. WILSON, Appellee and Defendant in Error,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant and Plaintiff in Error.

Assignment of Errors.

Now comes The Baltimore and Ohio Railroad Company, plaintiff in error, by its attorneys, and in connection with its petition for writ of error herein, makes and files this assignment of Errors:

1. The Appellate Court of Illinois, First District, erred in affirming the judgment of the Circuit Court of Cook County rendered herein.

2. The Appellate Court of Illinois, First District, erred in denying the petition of the plaintiff in error herein for a rehearing in said cause.

3. The Appellate Court of Illinois, First District, erred in refusing to reverse the judgment of the Circuit Court of Cook County and to remand the case to that court for a new trial.

371 4. The Appellate Court of Illinois, First District, erred in refusing to hold that the Circuit Court of Cook County should have granted the motion of this plaintiff in error for a new trial.

5. The Appellate Court of Illinois, First District, erred in holding that the Circuit Court of Cook County did not err in overruling

the motions of this plaintiff in error for peremptory instructions, and in marking "Refused" the written instructions tendered with each of said motions.

6. The Appellate Court of Illinois, First District, erred in holding that there was no error on the part of the Circuit Court of Cook County in refusing instruction No. 27, tendered by plaintiff in error, and reading as follows:

"The court instructs the jury that there is no evidence in the case that any violation of the Hours of Service Law proximately caused or contributed to the injuries for which this suit is brought; and you are therefore instructed that you cannot find the defendant guilty because or on account of the character or length of service in which plaintiff was engaged at and prior to his injury."

to which charge this plaintiff in error, the defendant below, duly objected and excepted, based upon the terms and provisions of the Act of Congress entitled "An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes therein," approved March 4, 1907, and commonly known as the Federal Hours of Service Act, the benefit of the terms and provisions of which said Act this plaintiff in error then claimed and now claims.

7. The Appellate Court of Illinois, First District, erred in holding that the trial court did not err in giving to the jury plaintiff's instruction No. 1, reading as follows:

"The jury are instructed that at and before the time of the plaintiff's injury there was in force as the law an Act of the Congress of
the United States, enacted for the safety of employes of com-
372 mon carriers engaged in the transportation of passengers or
property by railroad from one state of the United States to any other state of the United States, and for the safety of travelers upon such railroads; and it is provided in this Act that the term 'employe' as used in this Act shall be held to mean 'persons actually engaged in or connected with the movement of any train'; and it is further provided in said Act that it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employe subject to this Act, to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours, he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty."

"The jury are instructed that if you find from a preponderance of the evidence, under the instructions of the court in this case, that the defendant required or permitted the plaintiff from a time during the afternoon of August 21, 1913, until a time in the forenoon of August 22, 1913, for a period of more than sixteen consecutive hours, to work and be actually engaged in or connected with the movement of a train, as charged in the plaintiff's declaration, or some count thereof, and that the plaintiff as a proximate result of

such violation of said Act was injured, then in such event you are instructed that negligence upon the part of the plaintiff, if any, contributing to bring about his injury, is no defense in this case, and should not be considered by you in determining whether or not the defendant is guilty in this case. And further, if you find the defendant violated the Act above mentioned in this instruction, as aforesaid, and that such violation proximately contributed to plaintiff's injury, then you are instructed that you should not consider negligence, if any, on the part of the plaintiff at all in determining the amount of the plaintiff's damages, if any, in this case."

to which charge the plaintiff in error, the defendant below, duly objected and excepted, based upon the terms and provisions of said Act in said charge mentioned, the benefit of which the plaintiff in error then claimed and now claims.

8. The Appellate Court of Illinois, First District, erred in refusing to hold that the Circuit Court of Cook County should have granted the motion of plaintiff in error in arrest of judgment.

373 Wherefore The Baltimore and Ohio Railroad Company, plaintiff in error, prays that the judgment of the Appellate Court of Illinois, First District, affirming the judgment of the said Circuit Court of Cook County, Illinois, be reversed, and that judgment be rendered herein in favor of The Baltimore and Ohio Railroad Company, plaintiff in error, for its costs.

CALHOUN, LYFORD & SHEEAN,
Attorneys for Plaintiff in Error.

374 [Endorsed:] Gen. No. 20,956. Term No. —. Appellate Court. James B. Wilson vs. The Baltimore & Ohio R. R. Co. Assignment of Errors. Calhoun, Lyford & Sheean, "The Rookery," Chicago. Filed Appellate Court, Dec. 27, 1915.—James S. McInerney, Clerk.

375 And afterwards, on the same day, to-wit: the 27th day of December A. D. 19*16*, the following certificate was filed in said cause in words and figures following, to-wit:

376 In the Appellate Court of Illinois, First District.

Term No. 618; Gen. No. 20956.

JAMES B. WILSON, Appellee and Defendant in Error,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant and Plaintiff in Error.

Appeal from Circuit Court, Cook County.

Hon. Oscar E. Heard, Judge Presiding.

Certificate.

It being made to appear to me, William H. McSurely, Presiding Justice of the Appellate Court of Illinois, First District, that after the rendition of the final judgment in the above-entitled cause in our said court on the 5th day of October, 1915, and after the overruling by this court of the application of the plaintiff in error for a rehearing of said matter, on, to-wit, the 14th day of October, 1915, and within the time required by law, the said plaintiff in error filed its motion in the Supreme Court of Illinois for an order from said court directing the Appellate Court of Illinois, First District, to certify its record in said cause to said Supreme Court of Illinois, and that thereafter, to-wit, on the 21st day of December, 1915, said motion was overruled by said Supreme Court:

Now, therefore, I, William H. McSurely, Presiding Justice as aforesaid, do hereby certify that the said Appellate Court of Illinois, First District, is the highest court of law or equity of the State of Illinois in which a decision in said cause could be had under
377 the Constitution and laws of said State of Illinois, and do hereby order and direct that this certificate be made a part of the record in this cause.

Witness my hand this 27th day of December, A. D. 1915.

WILLIAM H. McSURELY,
Presiding Justice of the Appellate Court of Illinois, First District.

378 [Endorsed:] Gen. No. 20956. Term No. 618. Appellate Court. James B. Wilson, Appellee vs. The Baltimore & Ohio Railroad Company, Appellant. Certificate of Judge. Calhoun, Lyford & Sheean, "The Rookery," Chicago. Filed Appellate Court, Dec. 27, 1915. James S. McInerney, Clerk.

379 And afterwards, on the same day to-wit: the 27th day of December A. D. 1915 a supersedeas bond was filed in said cause, a copy of which said bond is in the words and figures following, to-wit:

380 In the Appellate Court of Illinois, First District.

Term No. 618; Gen. No. 20956.

JAMES B. WILSON, Appellee,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant.

Appeal from Circuit Court, Cook County.

Hon. Oscar E. Heard, Judge Presiding.

Supersedeas Bond.

Know all men by these presents, that we, The Baltimore and Ohio Railroad Company, a corporation under the laws of the State of Maryland, as principal, and the National Surety Company, a corporation under the laws of the State of New Jersey, as surety, are held and firmly bound unto the above-named James B. Wilson in the full and just sum of Fifty five thousand dollars for the payment of which well and truly to be made we bind ourselves, and each of us, and each of our successors and assigns, jointly and severally, by these presents.

Sealed with our seals, and dated this 24th day of December in the year of our Lord One Thousand Nine Hundred and Fifteen.

Whereas, the above named The Baltimore and Ohio Railroad Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the
381 above entitled suit by the Appellate Court of Illinois, First District, and has obtained citation directed to the said James B. Wilson citing and admonishing him to be and appear at a Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date thereof.

Now, therefore, the condition of this obligation is such that if the above named The Baltimore and Ohio Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs, if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By CHARLES D. CLARK, *Its Attorney in Fact.*
NATIONAL SURETY COMPANY,
By E. A. ST. JOHN, *Resident Vice-President.*

Attest:
HELGER W. CARLSON,
Resident Assistant Secretary.

Sealed and delivered in presence of:
——— ———.
——— ———.
——— ———.

Approved by:

WILLIAM H. McSURELY,
The Presiding Justice of the Appellate Court of Illinois, First District.

O. K.
MORSE IVES,
Pl'ff's Attorney.

382 And afterwards on the same day to-wit: the 27th day of December A. D. 1915 the following proceedings were had and entered of record in said cause, to-wit:

383 In the Appellate Court of Illinois, First District.

Gen. No. 20956.

JAMES B. WILSON, Appellee and Defendant in Error,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant and Plaintiff in Error.

Order Allowing Writ of Error, from the Supreme Court of the United States to the Appellate Court of Illinois, First District.

The above-entitled matter coming on to be heard upon the petition of the applicant, above plaintiff in error, for a writ of error from the Supreme Court of the United States to the Appellate Court of Illinois, First District, and upon examination of said petition and record in said matter, and desiring to give said petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter, it is ordered that a writ of error be and the same is hereby allowed in this Court from the Supreme Court of the United States, and that the bond presented by said petitioner be and the same is hereby approved. It is further ordered that said writ of error and said bond is to operate as a supersedeas and further proceedings stayed, until said matter shall be determined in said Supreme Court of the United States, in our said Appellate Court of Illinois, First District, and in the Circuit Court of Cook County, Illinois.

WILLIAM H. McSURELY,
Presiding Justice of the Appellate Court of Illinois, First District.

384 [Endorsed:] Gen. No. 20956, Term No. 618. Appellate Court. James B. Wilson vs. The Baltimore & Ohio R. R. Co. Order. Calhoun, Lyford & Sheean, "The Rookery," Chicago. Filed Appellate Court, Dec. 27, 1915. James S. McInerney, Clerk.

385 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Appellate Court of Illinois, First District, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Appellate Court of Illinois, First District, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between The Baltimore and Ohio Railroad Company, Defendant and Plaintiff in Error, and James B. Wilson, Plaintiff and Defendant in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or, wherein was drawn in question the validity of a statute of, or an authority exercised under said *state* on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or, wherein any title, right, privilege or immunity was claimed under the constitution or any treaty or statute of or commission held or authority exercised under the United States, and the decision was against the title, right, privilege or immunity specially set up or claimed under such clause of said constitution, treaty, statute commission or authority, a manifest error hath happened, to the great damage of the said The Baltimore and Ohio Railroad Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein
386 given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty (30) days from the date hereof. That the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 27th day of December, in the year of our Lord One Thousand Nine Hundred and 15.

[Seal of Dist. Court U. S., Northern Dist. Illinois, 1855.]

T. C. MACMILLAN,
Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division.

Allowed by—
WILLIAM H. McSURELY,
Presiding Justice of the Appellate Court of Illinois, First District.

387 [Endorsed:] Gen. No. —, Term No. —. Supreme Court of the United States. The Baltimore & Ohio Railroad Company, Plaintiff in Error, vs. James B. Wilson, Defendant in Error. Writ of Error. Calhoun, Lyford & Sheehan, "The Rookery," Chicago. Filed Appellate Court, Dec. 27, 1915. James S. McInerney, Clerk.

388 APPELLATE COURT,
First District, State of Illinois, ss:

I, James S. McInerney, Clerk of the said Court, do hereby certify that there was lodged with me as such clerk on December 27, 1915, in the matter of James B. Wilson versus The Baltimore and Ohio Railroad Company:

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth,—one for defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Chicago, Illinois, this 4th day of February, 1916.

[Seal Appellate Court of the First District, State of Illinois, July 1, 1877.]

JAMES S. McINERNEY,
Clerk Appellate Court of Illinois, First District.

389 And afterwards, on the 28th day of December A. D. 1915, the following citation on writ of error was filed in said cause in words and figures following, to-wit:

390 In the Supreme Court of the United States.

UNITED STATES OF AMERICA,
The Supreme Court of the United States, ss:

Citation on Writ of Error.

To James B. Wilson, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Appellate Court of Illinois, First District, wherein The Baltimore and Ohio Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable William H. McSurely, Presiding Justice of

the Appellate Court of Illinois, First District, this 27th day of December, A. D., 1915.

WILLIAM H. McSURELY,
Presiding Justice of the Appellate Court of Illinois, First District.

Service of the within Citation is hereby accepted this 28th day of December, A. D. 1915.

JAMES B. WILSON,
By MORSE IVES,
WEYMOUTH KIRKLAND,
C. E. STENNING,
His Attorneys.

391 [Endorsed:] Gen. No. 20956, Term No. 618. Appellate Court. James B. Wilson vs. The Baltimore & Ohio R. R. Co. Citation. Writ of Error. Calhoun, Lyford & Sheean, "The Rookery," Chicago. Filed Appellate Court, Dec. 28, 1915. James S. McInerney, Clerk.

392 And afterwards, on the 21st day of January A. D. 1916, the following proceedings were had and entered of record in said cause, to-wit:

393 In the Supreme Court of the United States.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff in Error,
vs.
JAMES B. WILSON, Defendant in Error.

In Error to the Appellate Court of Illinois, First District.

Affidavit.

STATE OF ILLINOIS,
County of Cook, ss:

John E. Conerty, being first duly sworn, on oath deposes and says that he is the Deputy Clerk of the Appellate Court of Illinois, First District; that he is preparing the record in the above-entitled cause, in which a writ of error from the Supreme Court of the United States to the Appellate Court of Illinois, First District, was granted on December 27, 1915; that owing to pressure of business in his office he will be unable to complete the preparation of the record and proceedings in the aforesaid case in time to return same to the Superme Court of the United States within thirty days from December 27, 1915, as directed by the aforesaid writ of error, and that it will be necessary in order to properly prepare the record and proceedings therein that the time for the preparation thereof be extended to February 15, 1916.

394 Wherefore, affiant prays that an order may be entered extending the time for the preparation of said record and pro-

ceedings herein, and the return thereof to the Supreme Court of the United States, to February 15, 1916.

JOHN E. CONERTY,
Deputy Clerk.

Subscribed and sworn to before me this 21st day of January, A. D. 1916.

[Seal Conrad L. Le Blanc, Notary Public, Cook Co., Ill.]

CONRAD L. LE BLANC,
Notary Public.

Ordered, on consideration of the foregoing affidavit and application, and for good cause shown, that the time for the preparation of said transcript and the return to the writ of error issued herein, be extended to and including February 15, 1916.

WILLIAM H. McSURELY,
Presiding Justice of the Appellate Court of Illinois, First District.

Dated this 21st day of January A. D. 1916.

395 [Endorsed:] Gen. No. —, Term No. —. U. S. Supreme Court. The Baltimore and Ohio Railroad Company, Plaintiff in Error, vs. James B. Wilson, Defendant in Error. Order Extending Time for Filing Transcript. Calhoun, Lyford & Sheean, "The Rookery," Chicago.

396 Be it remembered that heretofore on the 2nd day of January A. D. 1916 the following præcipe was filed in said cause in words and figures following, to-wit:

397 Copy.

In the Supreme Court of the United States and in the Appellate Court of Illinois, First District, *ss:*

In the Appellate Court of Illinois, First District.

No. 20956.

JAMES B. WILSON, Appellee (now Defendant in Error),
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant (now Plaintiff in Error).

Præcipe for Transcript of Record.

To James S. McInerney, Esq., Clerk of the Appellate Court of Illinois, First District:

You will please incorporate into the transcript of record to be filed in the Supreme Court of the United States in the above-en-

titled cause, the entire record showing all proceedings in the Appellate Court of Illinois; all portions of the record of the Supreme Court of Illinois transmitted to you showing the action of said Supreme Court of Illinois, upon the Petition for Writ of Certiorari filed by Plaintiff in Error.

CALHOUN, LYFORD & SHEEAN,
Attorneys for Plaintiff in Error.

I hereby acknowledge service of a copy of the foregoing præcipe.

MORSE IVES,
WEYMOUTH KIRKLAND,
C. E. STENNING,
Attorneys for Defendant in Error.

398 [Endorsed:] Copy. Gen. No. 20956. Term No. —. Appellate Court. James B. Wilson vs. Baltimore & Ohio R. R. Co. Præcipe for Transcript of Record. Appellatte Court. Filed Jan. 2, 1916. James S. McInerney, Clerk. Calhoun, Lyford & Sheean, "The Rookery," Chicago.

399 UNITED STATES OF AMERICA,
Appellate Court of Illinois, First District, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings of the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Appellate Court of Illinois, First District, in the City of Chicago, this 4th day of February, 1916.

[Seal Appellate Court of the First District, State of Illinois, July 1, 1877.]

JAMES S. McINERNEY,
Clerk Appellate Court of Illinois, First District.

Cost of Transcript of Record paid by Plaintiff in Error $184.50.

Endorsed on cover: File No. 25,125. Illinois Appellate Court, First District. Term No. 842. The Baltimore & Ohio Railroad Company, plaintiff in error, vs. James B. Wilson. Filed February 11th, 1916. File No. 25,125.

Office Supreme Court, U. S.
FILED
APR 4 1916
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1915.

No. 375

THE BALTIMORE & OHIO RAILROAD COMPANY,
Plaintiff in Error.

vs.

JAMES B. WILSON,
Defendant in Error.

In Error to the Appellate Court, First District, State of Illinois.

Motion by Defendant in Error to Dismiss or Affirm, and Suggestions in Support Thereof.

MORSE IVES,
Attorney for Defendant in Error.

CHAMPLIN LAW PRINTING CO.

INDEX.

Suggestions in Support of Motion to Dismiss or Affirm.

PAGE

Point I: The Appellate Court of Illinois was not the highest court of the State of Illinois in which a decision could have been had.... 7

Point II: No Federal question, substantial and not frivolous, has been reserved for review.. 9

Point III: The undisputed facts of this case establish not only liability under the second count of the plaintiff's declaration, but, as contributing to plaintiff's injury, a flagrant violation of the sixteen-hour law..... 15

Cases Cited.

Baltimore & Ohio R. R. Co. *vs.* Interstate Commerce Commission, 221 U. S. 612, 619..... 16

Consolidated Turnpike Co. *vs.* Norfolk & O. V. Ry. Co., 228 U. S. 326, 335..... 9

Constitution of Illinois, Sec. 11, Art. 5..... 8

Fisher *vs.* Perkins, 122 U. S. 522..... 8

Great Northern Ry. Co. *vs.* United States, 211 Fed. Rep. 309, 312, 313 16

Gregory *vs.* McVeigh, 23 Wall. 294..... 9

Hartford Life Ins. Co. *vs.* Unsell, 144 U. S. 439, 451 11

Heidenreich *vs.* Bremner, 260 Ill. 439, 445, 446 12

Holloway *vs.* Dunham, 170 U. S. 615, 619..... 12

Hulbert *vs.* Chicago, 202 U. S. 275, 281..... 10

Interstate Commerce Commission, April 1, 1911 16

Lamphere *vs.* Ore. R. & N. Co., 196 Fed. Rep. 336, 338 16
Little Rock & M. R. Co. *vs.* Moseley, 56 Fed. Rep. 1009; 6 C. C. A. 225 11
M. K. & T. Ry. Co. *vs.* United States, 231 U. S. 112, 119 15
Norfolk & Western Ry. Co. *vs.* Earnest, 229 U. S. 114, 122 12
Philadelphia, W. & B. R. Co. *vs.* Howard, 13 Howard, 397, 343, 344 11
San Pedro, L. A. & S. L. R. Co. *vs.* United States, 213 Fed. Rep. 326, 328 16
Scott *vs.* Parlin & Orendorff Co., 245 Ill. 460 . . 12
Statutes of Illinois, Sec. 121, Chap. 110 7
Stickney *vs.* Kelsey, 209 U. S. 419, 420 9
Stratton *vs.* Stratton, 239 U. S. 55 9
Union Ins. Co. *vs.* Smith, 124 U. S. 405, 424 12
United States *vs.* Denver & R. G. R. Co., 197 Fed. Rep. 629 15
United States *vs.* Kansas City Ry. Co., 189 Fed. Rep. 471, 475, 478 15
United States *vs.* Chicago, M. & P. S. Ry. Co., 195 Fed. 783, 785 16
W. C. St. R. R. Co. *vs.* Foster, 175 Ill. 396 11
Woods *vs.* Dailey, 211 Ill. 495, 498 11

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1915.

No. 842

THE BALTIMORE & OHIO RAILROAD COMPANY,
Plaintiff in Error.

vs.

JAMES B. WILSON,
Defendant in Error.

In Error to the Appellate Court, First District, State of Illinois.

Motion by Defendant in Error to Dismiss or Affirm, and Suggestions in Support Thereof.

Now comes the defendant in error, James B. Wilson, and moves that the writ of error in the above entitled cause be dismissed, or that the judgment of the court below be affirmed on the grounds, that the Appellate Court of Illinois was not the highest court of the state in which a decision of the suit could be had, and that the plaintiff in error reserved no federal questions for review, and that its respective contentions are foreclosed by previous decisions of this court and are frivolous.

Attorney for Defendant in Error.

SUGGESTIONS IN SUPPORT OF THE ABOVE MOTION.

James B. Wilson, on the 23rd day of August, 1913, was employed by the railroad company, now plaintiff in error, as a conductor of freight trains in interstate commerce. On that date, while in such employment, he was injured, and thereafter commenced a suit against the railroad company, his employer, in the Circuit Court of Cook county, Illinois, and filed his declaration, consisting of six counts, in one of which, the second (Trans. 5, 6), he alleged that the defendant negligently constructed a sidetrack unusually close to its main track at Peninsula, Ohio, so that it was dangerous for one to be between the main track and an engine passing upon the sidetrack; that the defendant knew of these dangerous conditions and he did not, and the defendant knew that he was ignorant thereof, and negligently failed to warn him of the unusually close proximity of said tracks. And in another count, the fifth (Trans. 10, 11), he alleged the violation by the defendant of the sixteen-hour law, and his injury thereby.

In support of the second count, it is shown that Wilson's usual work was over the Newcastle division of the defendant's road, running westward from Newcastle Junction, Pennsylvania, to Chicago Junction, Ohio; that the clearance upon this division, that is, the usual distance from cars standing upon main tracks to cars standing upon parallel side-

tracks, was about four feet or more (Trans. 42; Rec. 90), and he had never noticed any such distance of less than 3½ feet (Trans. 42; Rec. 91), and had not noticed such distances on any other division. Peninsula was between Cleveland and Akron on the Cleveland division. Wilson had run a train as conductor through Peninsula one trip, and at that time he did not notice anything about the distance the tracks were apart (Trans. 42; Rec. 91). The floods of the spring of 1913, several months previous to Wilson's injury, washed the ballast from under the tracks in Peninsula, and the sidetracks were washed down against main track (Trans. 91; Rec. 186). At that time the section foreman blocked up the tracks so they could run over them, and at the time Wilson was injured there was from one to two feet clearance between a car on the siding and a car on the main track there (Trans. 84, 71, 119). A brakeman passing between the engine standing on the siding there and the train turned his shoulders sideways to clear (Trans. 110; Rec. 225). They had been unloading slag there, and the condition of the roadbed or ground between the east rail of the main track and the west rail of the siding at that point was rough. The slag was there and hills and hollows (Trans. 110; Rec. 224).

At about 2 o'clock in the morning of August 23, 1913, Wilson, in charge of a train of 40 ore cars bound for points in Pennsylvania, arrived in Peninsula, and there was a "hot box" on the east side of the eighth car from the caboose, and for the purpose of setting this car out of the train he ordered one of the engines hauling the train to back north

upon the sidetrack parallel to and along the east side of the train. Wilson rode upon the west end of the footboard at the rear of the engine's tender. He carried a lantern, but it was dark and he could not observe any unusual distance or lack of distance between the engine and the train. Before he reached the "hot box" the engineer had shut off the power from the engine and the engine was "drifting" not over 5 or 6 miles an hour, just about an ordinary walk (Trans. 41; Rec. 89).

Wilson stepped off toward the "hot box" for the purpose of uncoupling that car from the train. The engineer saw his lantern strike a car and go out. He thought there was something wrong and stopped the engine, and Wilson was then found unconscious at the front of the engine.

In support of the fifth and other hours-of-service counts, the evidence shows that for 84 hours immediately before his injury, Wilson was devoting his entire time to the service of the defendant, as required by it, and by reason of its requirements he was able to obtain, during that period, but 4½ hours' sleep. Wilson lived at Newcastle, Pennsylvania. On August 19, 1913, he was called at 2:15 p. m. by the defendant to go west from Newcastle Junction on a train leaving at 4:15 p. m., for the purpose of relieving a train crew coming east (Trans. 27; Rec. 62). Under instructions from the defendant he was required to do preliminary work and be ready to leave at the time he was called to leave (Trans. 28; Rec. 64). On the 19th, Wilson reported at 3:40 p m. and performed such preliminary duties (Trans. 28; Rec. 65, 66), and then went to the station and waited.

The train was late. He left on it at 5:15 p. m. under directions to go until the conductor of that train would notify him to get off (Trans. 29; Rec. 67). He was ordered off at 6:05 p. m. at Ohio Junction, took charge of an east-bound freight train there and arrived at Newcastle Junction with his train about 2:45 a. m. following. He was then busy in incidental work for about 45 minutes, when he was ordered to go west on a freight train to meet another train coming east. He left Newcastle at 4 o'clock, was ordered off again at Ohio Junction, took charge of another east-bound train and reached Newcastle Junction with it at 10:55 a. m., August 20th, and then completing his work he left the yard for his home about 11:40 a. m. (Trans. 32; Rec. 72). From the time Wilson commenced work at 3:40 a. m. on August 19th, until he quit work at 11:40 a. m. on August 20th, he was on duty 20 hours. He reached his home at 12:05 p. m. on the 20th, ate his dinner and was getting ready for bed, when he was called by the defendant at 2:15 p. m. to again go west to again relieve a crew coming east. He reached the yard this day at 3:15 p. m. He did the same work he had done on the previous day and then again waited until the train left at about 5:15 p. m., upon which he rode to Akron Junction, 75 miles west of Newcastle, where the conductor told him to get off, and he took charge of a train there at 7:45 p. m., and reached Newcastle Junction with it at 9:10 o'clock the following morning August 21st (Trans. 34; Rec. 77), and he was busy registering at the roundhouse, getting his time slip signed, putting in his bills and wheel reports and registering at the

telegraph office and making extra reports, until 10:25 a. m. On this second trip, from the time he went to work on the 20th at 3:15 p. m. until he quit at 10:25 a. m. on the 21st, a period of 19 hours and 10 minutes had elapsed, and he had had no sleep since he left his house on the afternoon of the 19th, a period of about 44 hours. Upon his return from Akron on the 21st, he went home, ate his dinner, and went to bed about 1 o'clock and slept 2 hours. He was called again, at 3 o'clock and he arrived at Newcastle Junction at 4:25 p. m. (Trans. 35; Rec. 79) and was ordered to take charge of a train out of Newcastle Junction to Lorain, Ohio, and he was busy preparing for his departure until his train left at 6:30 p. m. He was all night with this train, reaching Warwick, Ohio, at 6:05 the next morning, August 22nd. He remained there in charge of his train until he was relieved as he testifies at 10 o'clock a. m. (Trans. 36; Rec. 80). He was "on duty" "connected with" this particular train 17 hours and 25 minutes. When relieved at Warwick he was ordered by the defendant to continue on this train and go to Cleveland, which he did under pay (Trans. 70; Rec. 144). There was no place for him to lie down (Trans. 37; Rec. 82). He arrived at Cleveland at 5:10 p. m., registered and got out of the yard at about 6:10, obtained supper, and went to bed in a caboose in the yard at 7:30. At that time, for the previous period of 77 hours, he had obtained just 2 hours' sleep. He then slept 2½ hours more until 10 o'clock that evening (Trans. 38; Rec. 84) when the defendant called him again, to take out a train from Cleveland. He commenced work at

once. He was sleepy and tired. Stumbling he bumped into the side of a car in the train and it woke him up. He had been dozing while walking along there (Trans. 39; Rec. 85). He was busy until his train left Cleveland at about 12:30 a. m. on August 23rd. On the road he tried to copy the numbers of the cars off his book onto the wheel report. The figures appeared double to him. He was afraid of going to sleep and went out on the rear platform of his caboose to keep awake (Trans. 39; Rec. 86). At Peninsula his attention was called to his condition while riding north on the running board just before he was hurt. A green tail light on the rear of the caboose appeared to him staggery, like two lights. He felt as if he could lie down on the footboard and go to sleep. In this condition he stepped off the footboard of his engine to uncouple the car with the "hot box" and was caught between the engine and the train, and injured.

There was a general verdict and judgment for the plaintiff. An appeal was taken by the defendant to the Appellate Court, First District of Illinois, and the judgment was there affirmed. The defendant did not ask for a certificate of importance in the Appellate Court or pray for an appeal there to the Supreme Court of Illinois. It petitioned the Supreme Court of Illinois for a writ of certiorari to the Appellate Court, which petition was denied, and a writ of error has been granted from this court to said Appellate Court.

Defendant in error contends:

That the Appellate Court of Illinois is not the highest court of the state in which a decision could have been had.

That no federal questions have been reserved in this case except such as are unsubstantial, frivolous and insufficient to give this court jurisdiction.

That the record in this case is free from error and that the judgment is so clearly right as to afford no reasonable ground for argument to the contrary.

I.

THE APPELLATE COURT OF ILLINOIS WAS NOT THE HIGHEST COURT OF THE STATE OF ILLINOIS IN WHICH A DECISION COULD HAVE BEEN HAD.

Section 121, chapter 110, Statutes of Illinois, provides as follows:

> "In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals and writs of error are specifically required by the constitution of the state to be allowed from the Appellate Courts to the Supreme Court, the judgments and decrees of the Appellate Court shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or any branch thereof shall be of opinion that any case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such cases grant appeals to the Supreme Court on petition of the parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any

> such case as is hereinbefore made final in the said Appellate Courts, it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case and with like effect, as if it had been carried by appeal or writ of error to the Supreme Court."

Section 11, article 5, Constitution of Illinois, provides that appeals and writs of error shall lie from the Appellate Courts to the Supreme Court "in all criminal cases, and cases in which a franchise or freehold or the validity of a statute is involved, and in such other cases as may be provided by law." No law has provided for an appeal or writ of error in a case such as this other than section 121 above quoted.

The complete record (Trans. 162-169) discloses no certificate of importance denied by the Appellate Court, no application therefor, and no prayer for an appeal in that court.

In *Fisher* v. *Perkins*, 122 U. S. 522, under like circumstances, the court say (p. 526):

> "The want of a certificate is good reason for refusing to allow an appeal, but until it has been asked for and refused, its absence furnishes no ground for a writ of error from this court."

And further (p. 527):

> "As it is, we find nothing in the record to show that the suit could not have been taken to the Court of Appeals if the necessary application had been made, and, consequently, we have no right to proceed. * * * The judgment is still the judgment of the Superior Court, which

> is not the highest court of the state, and it might have been taken to the Court of Appeals for review if the grant of an appeal had been applied for and secured."

Although the plaintiff in error took one and not the other of two courses open to it and filed its petition for certiorari in the Supreme Court of Illinois (Trans. 176), yet still the judgment against it might have been taken to the Supreme Court for review, "if the grant of an appeal had been applied for and secured." Everything was not done that could be done to take the case to the highest court of the state.

Gregory v. *McVeigh*, 23 Wall. 294.
Stratton v. *Stratton*, 239 U. S. 55.

It is certified by the presiding justice of the Appellate Court, that that court is the highest court of the state in which a decision in this case could be had (Trans. 191). However, that the certificate of the presiding justice cannot in itself "confer jurisdiction is too plain for controversy."

Consolidated Turnpike Co. v. *Norfolk & O. V. Ry. Co.*, 228 U. S. 326, 335.

II.

NO FEDERAL QUESTION, SUBSTANTIAL AND NOT FRIVOLOUS, HAS BEEN RESERVED FOR REVIEW.

1. Assignments of errors one, two, three, four (Trans. 188) and eight (Trans. 190), simply allege in various forms that the Appellate Court erred in its decision of the cause. "These assignments may be summarily overruled upon the plain ground that they present no federal question."

Stickney v. *Kelsey*, 209 U. S. 419, 420.

2. Assignment five (Trans. 188, 189), that it was error to affirm the trial court in refusing to give peremptory instructions requested by the defendant at the close of plaintiff's evidence and at the close of all the evidence (Trans. 152), is without foundation, because the evidence accurately stated by the Appellate Court (Trans. 186) in support of the second count (Trans. 5, 6) shows, if not negligence as a matter of law proximately contributing to plaintiff's injury, beyond controversy a question of fact for the jury. Contributory negligence under the statute is no defense other than in reduction of damages, and there is no evidence tending to show assumption of risk.

In its petition for a writ of certiorari in the Supreme Court of Illinois, the plaintiff in error alleged error respecting only the hours of service ground of liability (Trans. 176-185). It made no claim that a verdict should have been directed as to the second count of the declaration. It therefore waived or abandoned the right to make such claim now. *Hulbert* v. *Chicago,* 202 U. S. 275, 281. If this were not so, while it is necessary to petition the Supreme Court of a state before an Appellate Court can be said to be the highest court in which a decision could be had, such petition might, withholding substantial grounds, allege unfounded reasons only. And a litigant in an effort to obtain a decision of the Supreme Court of the United States, might petition for a writ of certiorari in the Supreme Court of a state, yet seek not to obtain it, and thereupon the jurisdiction of this court would depend upon the form and not the substance of such proceeding.

3. Assignment six (Trans. 189), that the Appellate Court erred in affirming the trial court's refusal to give instruction No. 27, as follows:

> "The court instructs the jury that there is no evidence in the case that any violation of the hours-of-service law proximately caused or contributed to the injuries for which this suit is brought; and you are therefore instructed that you cannot find the defendant guilty because or on account of the character or length of service in which plaintiff was engaged at and prior to his injury"

reserves no question for review, because:

(a) The defendant itself "at the same time" (Trans. 158; Rec. 328) it submitted instruction No. 27 tendered its fifteen other given instructions and by its instructions 19 and 20 (Trans. 157) presented to the jury the violation of the Hours of Service Act as a question of fact, and by instruction 16 it presented to the jury the question of proximate connection between such violation and plaintiff's injury.

Philadelphia, W. & B. R. Co. v. *Howard,* 13 Howard, 307, 343, 344.

Hartford Life Ins. Co. v. *Unsell,* 144 U. S. 439, 451.

Little Rock & M. R. Co. v. *Moseley,* 56 Fed. Rep. 1009; 6 C. C. A. 225.

W. C. St. R. R. Co. v. *Foster,* 175 Ill. 396.

Woods v. *Dailey,* 211 Ill. 495, 498.

The defendant merely afforded the court a choice between inconsistent instructions.

(b) Instruction No. 27, by its terms, in effect directs a verdict as to the hours-of-service counts,

and its refusal was harmless error under the state practice, if there was any good count in the declaration which the evidence tended to support.

Scott v. *Parlin & Orendorff Co.*, 245 Ill. 460.
Heidenreich v. *Bremner*, 260 Ill. 439, 445, 446.

(c) The defendant took but one general exception to the refusal of six separate instructions of which No. 27 was one (Trans. 158; Rec. 331), and made no special claim or exception as to any one of them; thus, under the federal practice it saved nothing for review.

Holloway v. *Dunham*, 170 U. S. 615, 619.
Union Ins. Co. v. *Smith*, 124 U. S. 405, 424.
Norfolk & Western Ry. Co. v. *Earnest*, 229 U. S. 114, 122.

(d) There was evidence plainly tending to show that the violation of the hours-of-service act contributed to plaintiff's injury.

4. Assignment seven (Trans. 189, 190), that the Appellate Court erred in holding the trial court did not err in giving to the jury the following instruction:

> "The jury are instructed that at and before the time of the plaintiff's injury there was in force as the law an Act of the Congress of the United States, enacted for the safety of employes of common carriers engaged in the transportation of passengers or property by railroad from one state of the United States to any other state of the United States, and for the safety of travelers upon such railroads; and it is provided in this Act that the term 'employe' as used in this Act shall be held to mean 'persons actually engaged in or connected with the move-

ment of any train'; and it is further provided in said Act that it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employe subject to this act, to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours, he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty.

"The jury are instructed that if you find from a preponderance of the evidence, under the instructions of the court in this case, that the defendant required or permitted the plaintiff from a time during the afternoon of August 21, 1913, until a time in the forenoon of August 22, 1913, for a period of more than sixteen consecutive hours, to work and be actually engaged in or connected with the movement of a train, as charged in the plaintiff's declaration, or some count hereof, and that the plaintiff as a proximate result of such violation of said Act was injured, then in such event you are instructed that negligence upon the part of the plaintiff, if any, contributing to bring about his injury, is no defense in this case, and should not be considered by you in determining whether or not the defendant is guilty in this case. And further, if you find the defendant violated the act above mentioned in this instruction, as aforesaid, and that such violation proximately contributed to plaintiff's injury, then you are instructed that you should not consider negligence, if any, on the part of the plaintiff at all in determining the amount of the plaintiff's damages, if any, in this case"

reserved no question for review, because:

(a) The defendant in the trial court specially set up or claimed nothing erroneous in this instruc-

tion or any part of it, but excepted generally to the giving of six instructions, of which this was one (Trans. 155; Rec. 311), and in the Appellate Court assigned error generally in the giving of all instructions on behalf of plaintiff (Trans. 161; Rec. 337). And the Appellate Court decided generally that there were no reversible errors in the instructions (Trans. 187), but did not deny, as far as it appears, any Federal right specially set up or claimed. In the petition for certiorari to the Supreme Court of Illinois appears for the first time a particular claim of error in this instruction (Trans. 184), viz.: that it "permitted the jury to overrule the legislatively declared judgment of Congress that ten hours off duty is a legally sufficient intervention to break the causal connection between previous overwork and subsequent injury," and this contention is plainly without foundation, because the Act provides for ten hours' rest when the limit, 16 hours on duty, is reached. There is no relationship presented between ten hours' rest and other periods on duty in excess of sixteen hours. It is not contemplated by the Act that ten hours' rest following thirty or forty or more hours on duty renders a railroad company immune from government prosecution or civil liability for the law's violation.

(b) The defendant itself submitted to the jury the same matter complained of in this instruction by its given instructions 16, 19 and 20 (Trans. 157).

(c) This instruction is a correct statement of the law applicable to the facts in the case.

III.

THE UNDISPUTED FACTS OF THIS CASE ESTABLISH NOT ONLY LIABILITY UNDER THE SECOND COUNT OF THE PLAINTIFF'S DECLARATION, BUT, AS CONTRIBUTING TO PLAINTIFF'S INJURY, A FLAGRANT VIOLATION OF THE SIXTEEN-HOUR LAW.

Wilson performed no duties for the defendant except as a conductor of freight trains.

He was not at all times "actually engaged" in "the movement of any train," but when not so engaged he was "connected with" such movement. And after he reported for duty on the 19th and 20th of August, and while performing preliminary work and while riding west until he should be ordered off to meet each train coming east, he was under pay, "under orders, liable to be called upon any moment and not at liberty to go away."

M. K. & T. Ry. Co. v. *United States*, 231 U. S. 112, 119.

Likewise, on August 22nd, on his trip from Warwick to Cleveland, he was under a specific order, under pay, where he could obtain no sleep and not at liberty to go away. So that from 2:45 p. m., on August 19th, until 2:30 a. m. on August 23rd, for a period of 84 hours, he was able to obtain but 4½ hours' sleep.

United States v. *Denver & R. G. R. Co.*, 197 Fed. Rep. 629.

United States v. *Kansas City Ry. Co.*, 189 Fed. Rep. 471, 475, 478.

United States v. *Chicago, M. & P. S. Ry. Co.*, 195 Fed. 783, 785.

Lamphere v. *Ore. R. & N. Co.*, 196 Fed. Rep. 336, 338.

At the time of his injury, Wilson was actually engaged in the movement of a train, and the purpose of the statute cannot be defeated by requiring long periods of service through other requirements of the carrier, "or by the commingling of duties relating to interstate and intrastate operations."

Baltimore & Ohio R. R. Co. v. *Interstate Commerce Commission*, 221 U. S. 612, 619.

San Pedro, L. A. & S. L. R. Co. v. *United States*, 213 Fed. Rep. 326, 328.

Great Northern Ry. Co. v. *United States*, 211 Fed. Rep. 309, 312, 313.

Plaintiff in error, however, relies on the ruling of the Interstate Commerce Commission issued April 1, 1911, as follows:

> "Hours of Service Law. Employes deadheading on passenger trains or on freight trains, and not required to perform, and not held responsible for the performance of any services or duty in connection with the movement of the train upon which they are deadheading, are not, while they are so dead-heading, 'on duty' as that phrase is used in the act regulating the hours of labor."

If this ruling be deemed applicable to such facts as this case presents, it is irreconcilable with the decisions of this Court and the decisions of the lower Federal courts above cited; for there is no differ-

ence that has any legal significance, between Wilson traveling under specific orders on a moving train, waiting for the next order to come, than if he were waiting upon a station platform or elsewhere.

The 4½ hours' sleep is not important for if the statute be applied as defendant claims it should be a conductor or an engineer may be employed indefinitely without any sleep and then be sent forth in charge of a train, a source of the gravest danger to himself and the passengers and crews of his own and all other trains along the line.

The trial court, however, ruled with the defendant, and limited by defendant's instruction 19 (Trans. 157) plaintiff's right to ecover, if at all, under the charge of a violation of the sixteen-hour law, to the single trip from Newcastle Junction, Pennsylvania, to Warwick, Ohio, during August 21st and 22nd, upon which trip Wilson, according to his testimony, was actually engaged in or connected with the movement of a train for 17 hours and 25 minutes.

If this ruling be wrong it affords no advantage to the plaintiff in error now. If it be right it is pertinent only on the question of proximate connection between the violation of the statute on the trip to Warwick and plaintiff's exhausted condition at the time of his injury.

Wilson's condition was naturally due to the prolonged period of work and sleeplessness. The time of the trip to Warwick was a part of that period. The whole period cannot be divided into parts and

it then be said that any one part did not contribute to the whole. So if the statute in its application be thus limited it still has scope and strength enough left to destroy the logic of defendant's proximate cause contention.

Respectfully submitted,

MORSE IVES,
Attorney for Defendant in Error.

Office Supreme Court, U. S.
FILED
NOV 11 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. ~~1915~~ 1916

No. ~~842~~ 375

THE BALTIMORE & OHIO RAILROAD COMPANY,
Plaintiff in Error,

vs.

JAMES B. WILSON,
Defendant in Error.

IN ERROR TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

WILL H. LYFORD,
GEORGE E. HAMILTON,
Attorneys for Plaintiff in Error.

[illegible] PRINTING COMPANY, CHICAGO.

INDEX.

	Page
Statement of facts	1
Pleadings	2-4
Instructions:	
Defendant below	15-18
Peremptory	17
Plaintiff below	13, 14, 19
Errors relied upon	18
Federal questions presented	14, 15, 16, 17
Geography of accident	4
Deadhead time	4, 5, 8, 22
Hours of Service Act:	
Has fixed boundaries of employer's liability	37
Proximate relationship between violation of and injury necessary	30
No recovery under unless same being violated at time of injury	21
Wilson, plaintiff below:	
Experience of	4
Knowledge of the tracks	9
Manner in which injured	8, 9, 12
Physical condition	9, 11
Time of relief at Warwick	6, 7, 8
Work on previous days	4, 5, 6

Table of Cases.

A. T. & S. F. Ry. Co. v. Swearingen, 239 U. S., 339	36
Erie R. R. Co. v. New York, 233 U. S., 671; 58 Law. Ed., 1149	39
Great Northern R. R. Co. v. Wiles, Admr., 240 U. S., 444	29
Interstate Commerce Ruling No. 74	22
Osborne's Admr. v. C. N. O. & T. P. Ry. (Kentucky Court of Appeals), 164 S. W., 818	23
St. Louis, Iron Mountain & S. Ry. v. McWhirter, 229 U. S., 265; 57 Law. Ed., 1179	31, 33
Smith v. A., T. & S. F. Ry. (Civil Appeals of Texas), 87 S. W., 1052	25
Staley v. I. C. R. R. Co., 268 Ill., 356	37
Schweig v. C., M. & St. P. Ry. Co., 216 Fed. Rep., 750	26

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1913

No. 842 375

THE BALTIMORE & OHIO RAILROAD COMPANY,
Plaintiff in Error,

vs.

JAMES B. WILSON,
Defendant in Error.

IN ERROR TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

STATEMENT OF FACTS.

This action was for personal injuries sustained by the defendant in error at Peninsula, Ohio, about 2 A. M., August 23, 1913.

There was a verdict and judgment in the Circuit Court of Cook County, Illinois, against the plaintiff in error for $45,000, which was affirmed by the Appellate Court of Illinois, First District.

A petition for a writ of certiorari was refused by the Supreme Court of Illinois, and thereupon the case was brought to this court by writ of error.

The declaration consists of five original counts (Trans., 2-11) and one additional count. (Trans., 13-15.)

All of the counts allege the engagement of the plaintiff in error in interstate commerce and the employment of the defendant in error by it as a freight conductor. All of the counts predicate liability upon the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L., 65, Chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), as amended April 5, 1910 (35 Stat. at L., 291, Chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324).

The first and third counts were taken from the consideration of the jury by peremptory instructions given by the trial court. Three of the other four counts set out in minute detail the alleged exact hours when the defendant in error went on and off duty on the 19th, 20th, 21st, 22nd and 23rd days of August, 1913, and each avers the violation of the Federal Hours of Service Act in that respect so that (Trans., 14) by reason of such violations by the plaintiff in error the defendant in error became nervous and exhausted, his senses dulled, his judgment impaired; and that while he was in such condition, shortly after midnight on the 23rd day of August, 1913, he was required and permitted by the plaintiff in error to take charge of a freight train bound from Cleveland, Ohio, to New Castle Junction, Pennsylvania; that the defendant in error accordingly took charge of such train, and had proceeded as far as Peninsula, Ohio, where the train was brought to a stop, standing upon the main track; that in order to take out from such train a hot box car the defendant in error caused an engine to be detached from said train and to be backed in and along

a sidetrack for the purpose of reaching the other end of the train, preliminary to taking out the hot box car; that this sidetrack was immediately adjoining the main track upon which the train was standing; that as the engine backed in upon the sidetrack the defendant in error rode upon the footboard of the tender, and upon the side of the footboard closest to the train, and that as the engine approached the point in said train where the hot box car was located, the defendant in error then and there, by reason of the several violations of the Federal Hours of Service Act, and by reason of his nervous and exhausted condition, as aforesaid, was unable to protect himself from injury, and stepped off from the footboard of the engine toward the train, and between the tracks; that he then and there struck against one of the cars of the train, and was thrown back under and against the moving engine, and as a direct result of the several violations of law aforesaid he was greatly injured.

The second count of the declaration makes no reference to "hours on duty" by the defendant in error, prior to the trip upon which he was injured, but avers negligence upon the part of the plaintiff in error "in constructing a certain sidetrack there unusually close to said main track." This count does not contain any averment that the defendant in error was in the exercise of ordinary care at and prior to the time of his injury; and under this second count the meaning and application of the Hours of Service Act are necessarily involved, for the reason that defendant in error's instruction No. 1 charged the jury that if any violation of the Hours of Service Act "proximately contributed to plaintiff's injury, then you are instructed that you should not consider negligence, if any, on the part of plaintiff at all in determining the amount of plaintiff's damages, if any, in this case" (Trans., 153); and for the further reason

that defendant in error's instruction No. 2 charged the jury that in suits brought under the Employer's Liability Act because of any "defect or insufficiency due to its negligence in its * * * track, roadbed," etc., no employee shall be held to have been guilty of contributory negligence or to have assumed the risk of his employment "in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury of such employee."

The defendant in error, at the time of his injuries, was 29 years of age. He had entered the service of the plaintiff in error as a brakeman in 1907, and had been promoted to the position of a conductor some three or four months prior to the time of his injuries. His services had been upon what was known as the Newcastle and Cleveland Divisions. He was injured at Peninsula, a station on the Cleveland Division, about 2 A. M. on the morning of August 23rd.

Through the Village of Peninsula there is a single main track running in a general north and south direction. Just north of the station are two sidetracks lying immediately east of and parallel with the main track. The main track and the passing siding next to same were built in 1878 or 1879, and were then constructed upon what are called twelve-foot centers. (Trans., 21.) In April, 1913, what were known as the "Ohio floods" interfered with the use of these tracks for some sixteen or eighteen days, and after the floods subsided, the tracks were relaid practically as before, although the alignment was not quite as good. (Rec., 54; Trans., 21.)

On August 19, 1913, defendant in error as a conductor was directed to go west from Newcastle Junction on what was known as the mail train, to relieve the crew of an eastbound train. He accordingly left Newcastle Junction

on such mail train at 5:19 P. M. and rode 25 miles to Ohio Junction, where he was directed to get off and take charge of an eastbound freight train which he was to relieve, and which was known as "Extra Engine 4057 east." He left Ohio Junction in charge of this train, at 11:03 P. M., and arrived at Newcastle Junction at 1:10 A. M. on the morning of the 20th. He was relieved from further duty at 2:43 A. M. the same morning. (Rec., 302; Trans., 150.)

The defendant in error had been called to report for duty at 4:15 P. M., the time at which the mail train was due to leave. It was, however, late, and did not leave until 5:19. While riding upon this train, although under pay, he was not considered as "on duty," and had no responsibilities or duties to perform with reference to that or any other train. (Rec., 116; Trans., 55.)

The defendant in error was again called to go west on freight train 97, and relieve another crew coming east. Upon this second trip, he left Newcastle Junction at 4:03 A. M., August 20th, and arrived at Ohio Junction at 5:11 A. M. He left Ohio Junction in charge of eastbound freight "Extra Engine 4088" at 6:10 A. M., and arrived at Newcastle Junction at 10:40 A. M., the same morning, and was relieved from duty ten minutes later. (Rec., 302; Trans., 150.)

While riding on this freight train No. 97, he was again "deadheading" and had no responsibility with reference to the movement or management or control of the train. (Rec., 117; Trans., 56.)

About 2:15 P. M., on August 20th, the defendant in error was notified that he should again deadhead on the mail train west from Newcastle Junction and take charge of another eastbound freight. The mail train in question left Newcastle Junction at 5:12 P. M., carrying de-

fendant in error as far as Akron Junction, Ohio, where he arrived at 7:33 P. M. At that point defendant in error took charge of an eastbound freight train drawn by engines 4044 and 4042, leaving there at 12 o'clock midnight and arriving again in Newcastle Junction at 9:05 A. M., August 21st, at which time he was again relieved. (Rec., 302; Trans., 151.)

The defendant in error's next move was to start from Newcastle Junction at 5:30 P. M. (Rec., 123; Trans., 59), with a train for Lorain, Ohio. The next morning, August 22nd, defendant in error had arrived in charge of this train at Warwick, Ohio, at 6:05 A. M. At this point he was notified about 8 o'clock A. M. that he in turn would be relieved by another conductor. (Rec., 124; Trans., 60.)

Defendant in error testified to the time of his being relieved from duty at Warwick, as follows:

"Q. And what time were you relieved?
A. Ten o'clock.
Q. And who relieved you?
A. John Stewart.
Q. Where was your train? How far from the depot there?
A. Two miles.
Q. Two miles west of the depot?
A. Yes, sir.
Q. Do you know what time Stewart got into Warwick that morning?
A. Stewart went by me; the train he was on went by where I was about 8:40.
Q. And how did Stewart get out to where you were?
A. He walked.
Q. And where were you when he reached you?
A. I was over at the telephone.
Q. At the west end of the siding?
A. Yes, sir.
Q. You were near the engine of your train?
A. Yes, sir; right near the engine.

Q. And that was about 10 o'clock?
A. He came there about 10.
Q. Did you make a record of the time you were relieved there that morning?
A. Not at Warwick.
Q. Did you make a record later?
A. Yes, sir.
Q. And when?
A. We made a record on the way to Cleveland at 8:45.
Q. Who was with you when you made your record?
A. Stewart.
Q. Stewart, the conductor that relieved you?
A. Yes, sir.
Q. And what time did you record as the time you were relieved?
A. Ten o'clock.
Q. Did you make a record in your book of the time you were relieved?
A. 8:45." (Rec., 80, 81; Trans., 36, 37.)

The conductor who relieved him, S. M. Stewart, testified that such relief occurred at 8:45 A. M. (Rec., 290; Trans., 145.)

Stephen O. Lewis, the engineer of the train from Newcastle to Warwick, testified to being relieved at 8:45 A. M. (Rec., 278; Trans., 138.)

Hiram Cearfos, brakeman upon the same train, testified to the relief time as between 8 and 9 o'clock in the morning. (Rec., 220; Trans., 108.)

Conductor Stewart made an entry at the time in his "Conductor's Train Record" showing that he relieved defendant in error at 8:45. He also at the same time made an endorsement upon the back of his time slip, to having relieved Conductor Wilson at 8:45 A. M. (Rec., 293, 294; Trans., 146.) (Through error in printing the record herein this last exhibit does not show the endorsement upon the back of the time slip.) The train sheets of the plaintiff in error made up by its train dispatcher

received from telegraphic reports received from telegraph operators also gave the time of relief as 8:45 A. M. (Rec., 303; Trans., 151.)

The relief crew, under Conductor S. M. Stewart, came upon a passenger train running in the opposite direction to that in which defendant in error Wilson's train was heading. This passenger train stopped at coal tipple (located between where Wilson's engine was standing upon the sidetrack and the station to the east) about a hundred car lengths east of defendant in error's engine. Conductor Stewart and the other members of the relief crew got off from the passenger train at this coal tipple and walked from there to defendant in error Wilson's train. (Rec., 279; Trans., 139.)

After being relieved at Warwick the defendant in error and other members of his crew deadheaded upon the same train to Cleveland, arriving there at 5:10 P. M., August 22nd. Later in the evening the defendant in error was notified that he was to take a train from Cleveland to Akron. He left Cleveland in charge of this train about 12:30 A. M., on the morning of August 23rd. The train consisted of forty cars and a caboose drawn by two engines. It stopped at Peninsula on the main track to take water for the engines. Some four or five miles before Peninsula had been reached, the defendant in error discovered two hot box cars in the train. At Peninsula, one of these hot box cars was fixed, but it was determined to set the other hot box car out of the train.

In pursuance of this plan, the defendant in error caused one of the engines to be detached and backed upon the sidetrack along the side of the train. Defendant in error himself rode upon the rear footboard (forward end of engine in direction of movement) standing

upon the end thereof next to the main track upon which his train was standing. As the engine proceeded backing on the sidetrack, the defendant in error, although he had a lantern, did not give any stop or slow signal or signals of any kind. (Rec., 138; Trans., 67.) The speed of the backing engine was variously estimated by the witnesses at from five or six to eight or ten miles per hour.

When the backing engine arrived opposite the place in the train where the hot box car was, the defendant in error got off between the engine and the cars; the last thing he remembered was stepping down off the footboard with his left foot, but whether that foot ever reached the ground, he did not know. (Rec., 143; Trans., 70.) The engineer of the backing engine saw what he termed some mismove of defendant in error and his lantern, and stopped as quickly as he could. The defendant in error, Wilson, was found just at the front of the engine, injured. (Rec., 265; Trans., 131.)

The defendant in error, Wilson, knew nothing of the distance or space between the main and passing siding at Peninsula. (Rec., 90; Trans., 42.) His testimony as to his physical condition at the time can best be shown by his actual testimony, and we quote from the record as follows (Trans., 39):

"Q. What was your condition at that time, Mr. Wilson, that is between the time you were called and the time you left Cleveland that night?

A. I was awful sleepy and tired.

Q. Was there anything there in the yard that night that called your attention to your condition?

A. Yes, sir.

Q. What was it?

A. When I was coming from the caboose down to the yard office the head brakeman and I were walking along between the train I had in there and another one that they had brought in later, between

the two tracks, and we were walking along there, and I stumbled and bumped into the side of a car in the train I brought in, and it woke me up. I had been dozing and walking along there.

Q. And after you left Cleveland did you do anything in connection with your train there?

A. Yes, sir.

Q. What did you do?

A. I had my book with the numbers of the cars on. The wheel report did not have any numbers on it. I was trying to copy the numbers off the book on to the wheel report, and when I would look down at the book to get the numbers, it looked as though there was two numbers. I couldn't get them. It was double. I had a meet order for an extra.

Q. What do you mean by a 'meet' order?

A. A meet order to meet an extra train coming in the opposite direction, and I knew I didn't dare to sit there or I would go to sleep. I had to keep awake.

Q. Did you fill out your report?

A. No, sir; I couldn't finish it. I started to do so when I was marking the report down, and I couldn't keep awake, and I went and rode on the rear platform of the caboose. * * * (Trans., 41.)

Q. What was your condition—that is, when you were riding north on that running board?

A. I was awful sleepy and tired.

Q. Was there anything at that time that called your attention to your condition?

A. Yes, sir.

Q. What was it?

A. I could see the tail light on the rear end of the caboose. It was green. From the direction I was looking at it, I looked at it and it looked like two lights, staggery-like, like two lights, and I knew there was only one. My eyes seemed blurred. I felt I could lay right down on that footboard and go to sleep.

Cross-Examination (Trans., 63).

Q. Now, you observed, I believe you said, that after you were called that night and on your way down, before you took charge of the train, that you

stumbled or bumped against some other cars on the way down?

A. I bumped up against the car, run into the side of the cars.

Q. That was on your way down to the roundhouse?

A. That was on my way down to the yard office.

Q. To the yard office? And that was the time that you noticed that you were sleepy also?

A. Yes, sir.

Q. That was before you had registered out or taken any train at all?

A. That was after I was called. That was while I was going down.

Q. After you were called and on your way down to the yard office?

A. Yes, sir.

Q. Who did you see at the yard office when you got down there?

A. I saw the yardmaster.

Q. Saw the yardmaster?

A. And the clerk.

Q. And the clerk. Did you say to either of them anything about the fact that you were sleepy?

A. No, sir.

Q. Did you say to either of them that you had found yourself staggering and bumping against cars on the way down?

A. No, sir.

Q. Did you intimate to either of them that you thought you were not in a fit condition to take care of a train?

A. I asked the yardmaster for a pilot, that was all?

Q. For a pilot?

A. Yes, sir.

Q. You told him nothing about feeling tired nor sleepy?

A. I did not.

Q. Told him nothing about having stumbled even?

A. No, sir.

(Trans., 70.)

Q. You do not know whether you struck the side of this car or did not strike it, do you?

A. No, sir.
Q. You do not know whether you slipped or stumbled, do you; you have no knowledge as to that?
A. I know I did not slip or stumble.
Q. What is it?
A. Off of the footboard.
Q. No, but on the ground.
A. I do not remember after that.
Q. Your last recollection is at the time that you stepped down?
A. Off the footboard.
Q. Did you step with your left or right foot first?
A. I stepped with my left.
Q. With your left foot. And at that time do you remember whether you had your lantern in your left or right hand?
A. I do not.
Q. You have no recollection of whether that foot ever reached the ground or not?
A. I have not.
Q. Both feet had not left the footboard at the time that you last remember what took place?
A. I don't know.
Q. Whether you fell asleep there at that time or not, you don't know?
A. I don't know."

Under the uncontradicted evidence and under instruction 19 (Trans., 157), the only question as to any violation of the Hours of Service Law is whether plaintiff was relieved on August 22, at 8:45 A. M. (as testified by several witnesses) or at 10 A. M. (as testified by defendant in error).

If it be assumed that the jury accepted the statement of defendant in error and rejected that of the other witnesses, then the only violation of the act was permitting the defendant in error to remain in charge of his engine (which stood on a sidetrack waiting for the relief crew) from 9:30 A. M. (when the sixteen hours on duty expired) until 10 A. M.—a thirty-minute violation sixteen hours prior to the time of injury.

Assuming, for argument's sake, that defendant in error was not relieved until 10 A. M., at Warwick, on the morning of August 22, he did not again resume duty until 12 o'clock midnight of the same day, a period of fourteen hours. This was four hours more off duty time than the statute required. Notwithstanding this lapse of fourteen hours off duty time, and the fact that the defendant in error, when he took charge of the train at Cleveland at midnight, was again under the statute eligible for duty, the trial court gave to the jury the defendant in error's instruction No. 1, which is as follows:

> "The jury are instructed that at and before the time of the plaintiff's injury there was in force as the law an act of the Congress of the United States, enacted for the safety of employees of common carriers engaged in the transportation of passengers or property by railroad from one state of the United States to any other state of the United States, and for the safety of travelers upon such railroads; and it provided in this act that the term 'employe' as used in this act shall be held to mean 'persons actually engaged in or connected with the movement of any train'; and it is further provided in said act that it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employe subject to this act, to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted to again go on duty until he has had at least ten consecutive hours off duty.
>
> The jury are instructed that if you find from a preponderance of the evidence, under the instructions of the court in this case, that the defendant required or permitted the plaintiff from a time during the afternoon of August 21st, 1913, until a time in the forenoon of August 22nd, 1913, for a period of more than sixteen consecutive hours, to work and be actually engaged in or connected with the move-

ment of a train, as charged in the plaintiff's declaration, or some count thereof, and that the plaintiff as a proximate result of such violation of said act was injured, then in such event you are instructed that negligence upon the part of the plaintiff, if any, contributing to bring about his injury, is no defense in this case, and should not be considered by you in determining whether or not the defendant is guilty in this case. And further, if you find the defendant violated the act above mentioned in this instruction, as aforesaid, and that such violation proximately contributed to the plaintiff's injury, then you are instructed that you should not consider negligence, if any, on the part of the plaintiff at all in determining the amount of the plaintiff's damages, if any, in this case." (Rec., 306; Trans., 152.)

The defendant in error excepted to the giving of the above instruction, and now claims that the court by the giving of said instruction advised the jury that if they found that on the previous trip the plaintiff in error had been required to or permitted by the defendant in error to work for more than sixteen hours consecutively in connection with the actual movement of his train, and that as a result in whole or in part thereof he was injured, that then the contributory negligence of the defendant in error should not be considered by the jury either in passing upon the question of whether the plaintiff in error was negligent or guilty, and, if so, in determining the amount of the damages to be paid by it therefor to the defendant in error.

The record thus presents the question:

(a) May a trainman engaged in interstate commerce and injured by reason of his exhausted condition brought about by his having on a previous occasion been permitted to remain on duty in violation of the Hours of Service Act, where such exhausted condition was known to him, but unknown to his employer, recover for

such injuries, if at the time of receiving same his then being on duty was not a violation of the Federal Hours of Service Act?

The record contains no evidence whatever which in any way connects the claimed thirty minute violation of the Hours of Service Act at Warwick on the morning of August 22nd with the injuries sustained by the defendant in error some sixteen hours later at Peninsula, Ohio. This raises another question:

(b) May a violation of the Hours of Service Act as to time "on duty" antecedent to the period of service on which an injury was received, and separated from it by a longer period of time "off duty" than the Hours of Service Act requires, be held to be the proximate cause of such injury?

The above question was also raised by the refusal of the court to give plaintiff in error's instruction number 27, reading as follows:

> "The court instructs the jury that there is no evidence in the case that any violation of the hours of service law proximately caused or contributed to the injuries for which this suit is brought; and you are therefore instructed that you cannot find the defendant guilty because or on account of the character or length of service in which plaintiff was engaged at and prior to his injury." (Rec., 329; Trans., 158.)

The tired and exhausted condition of the defendant in error at the time he took charge of the train at Cleveland at midnight on August 23rd was fully known to the defendant in error, but unknown to the plaintiff in error.

The giving of defendant in error's instruction number 1, above set out in full, and the giving of defendant in error's instruction number 2 (Rec., 308; Trans., 153) presents another question:

(c) May an interstate carrier permit an employee who has been on duty continuously for more than 16 hours, again to go on duty after having more than 10 consecutive hours off duty, when any disability which said employee may have suffered by reason of having on the previous trip been on duty more than 16 hours is unknown to the employer?

The giving of defendant in error's instructions numbers 1 and 2 presents the further questions:

(d) In a suit by a trainman engaged in interstate commerce for injuries received by reason of his exhausted condition brought about by having been permitted on a previous trip to be continuously on duty more than sixteen hours, and where, since the trip on which said violation of the Hours of Service Act occurred, the employee has been given more than ten consecutive hours off duty, may the court eliminate defenses of contributory negligence and assumed risk by instructing the jury that the *violation on said previous trip* suspends the operation of the doctrines of contributory negligence and assumed risk *on a subsequent trip* on which the injury occurred;

(e) In such a case may the court submit to the jury the question whether the "ten consecutive hours off duty," provided by the Hours of Service Act, was or was not a sufficient length of time to break the causal connection between the antecedent period of overwork and the subsequent injury, where the employer had no knowledge of the employee's exhausted condition when resuming work after the expiration of more than "ten consecutive hours off duty."

In the construction placed by the court upon the Hours of Service Act in the giving of defendant in error's instruction number 1, a further question is presented:

(f) In a suit by a trainman engaged in interstate

commerce for injuries received by reason of his exhausted condition brought about by his having been permitted on a previous trip to be continuously on duty more than sixteen hours, and where since the termination of the trip upon which the violation occurred he has been given ten hours or more "off duty" time, as required by the Hours of Service Act, may the court submit to a jury the question whether the "off duty" time so given was or was not sufficient to break the causal connection between the exhausted condition brought about by reason of the overtime violation on the preceding trip and the injuries sustained in the succeeding trip.

The plaintiff in error herein (defendant below) at the close of the plaintiff's case in the trial court, tendered to that court in writing the following motion and instruction (Rec., 237; Trans., 116-117):

> "Comes now the defendant in the above-entitled cause, by Calhoun, Lyford & Sheean, its attorneys, at the close of all the evidence offered on behalf of the plaintiff, and moves the court to give to the jury a written instruction in the following form:
>
> 'The court instructs the jury to find the defendant not guilty.'"

and at the close of all of the testimony tendered in writing the following motion and instruction:

> "Comes now the defendant in the above-entitled cause by Calhoun, Lyford & Sheean, its attorneys, at the close of all the evidence on behalf of both the plaintiff and the defendant, and moves the court to give to the jury a written instruction in the following form:
>
> 'The court instructs the jury to find the defendant not guilty.'"

both of which motions were refused by the trial court, and exception was duly taken by the defendant below.

ERRORS RELIED UPON.

The errors now assigned are recited in full upon pages 188 to 190 exclusive of the Transcript of Record. They include the following:

1. The Appellate Court of Illinois, First District, erred in affirming the judgment of the Circuit Court of Cook County rendered herein.

2. The Appellate Court of Illinois, First District, erred in denying the petition of the plaintiff in error herein for a rehearing in said cause.

3. The Appellate Court of Illinois, First District, erred in refusing to reverse the judgment of the Circuit Court of Cook County and to remand the case to that court for a new trial.

4. The Appellate Court of Illinois, First District, erred in refusing to hold that the Circuit Court of Cook County should have granted the motion of this plaintiff in error for a new trial.

5. The Appellate Court of Illinois, First District, erred in holding that the Circuit Court of Cook County did not err in overruling the motions of this plaintiff in error for peremptory instructions, and in marking "Refused" the written instructions tendered with each of said motions.

6. The Appellate Court of Illinois, First District, erred in holding that there was no error on the part of the Circuit Court of Cook County in refusing instruction No. 27, tendered by plaintiff in error, and reading as follows:

> "The court instructs the jury that there is no evidence in the case that any violation of the Hours of Service Law proximately caused or contributed

to the injuries for which this suit is brought; and you are therefore instructed that you cannot find the defendant guilty because or on account of the character or length of service in which plaintiff was engaged at and prior to his injury."

to which charge this plaintiff in error, the defendant below, duly objected and excepted, based upon the terms and provisions of the Act of Congress entitled "An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes therein," approved March 4, 1907, and commonly known as the Federal Hours of Service Act, the benefit of the terms and provisions of which said act this plaintiff in error then claimed and now claims.

7. The Appellate Court of Illinois, First District, erred in holding that the trial court did not err in giving to the jury plaintiff's instruction No. 1, reading as follows:

"The jury are instructed that at and before the time of the plaintiff's injury there was in force as the law an Act of the Congress of the United States, enacted for the safety of employes of common carriers engaged in the transportation of passengers or property by railroad from one state of the United States to any other state of the United States, and for the safety of travelers upon such railroads; and it is provided in this Act that the term 'employe' as used in this Act shall be held to mean 'persons actually engaged in or connected with the movement of any train'; and it is further provided in said Act that it shall be unlawful for any common carrier, its officers or agents, subject to this Act, to require or permit any employe subject to this Act, to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours, he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty.

The jury are instructed that if you find from a

preponderance of the evidence, under the instructions of the court in this case, that the defendant required or permitted the plaintiff from a time during the afternoon of August 21, 1913, until a time in the forenoon of August 22, 1913, for a period of more than sixteen consecutive hours, to work and be actually engaged in or connected with the movement of a train, as charged in the plaintiff's declaration, or some count thereof, and that the plaintiff as a proximate result of such violation of said Act was injured, then in such event you are instructed that negligence upon the part of the plaintiff, if any, contributing to bring about his injury, is no defense in this case, and should not be considered by you in determining whether or not the defendant is guilty in this case. And further, if you find the defendant violated the Act above mentioned in this instruction, as aforesaid, and that such violation proximately contributed to plaintiff's injury, then you are instructed that you should not consider negligence, if any, on the part of the plaintiff at all in determining the amount of the plaintiff's damages, if any, in this case."

to which charge the plaintiff in error, the defendant below, duly objected and excepted, based upon the terms and provisions of said act in said charge mentioned, the benefit of which the plaintiff in error then claimed and now claims.

8. The Appellate Court of Illinois, First District, erred in refusing to hold that the Circuit Court of Cook County should have granted the motion of plaintiff in error in arrest of judgment.

BRIEF.

I.

THE DISABILITY OF THE DEFENDANT IN ERROR TO PERFORM THE DUTIES OF HIS DANGEROUS OCCUPATION WITH A DEGREE OF CARE COMMENSURATE WITH THE HAZARDS OF THAT OCCUPATION, AND WHICH DISABILITY WAS KNOWN TO HIM AND NOT COMMUNICATED TO HIS EMPLOYER, DEFEATS RECOVERY, UNLESS AT THE TIME OF HIS INJURY THE VERY FACT OF HIS THEN BEING ON DUTY WAS A VIOLATION OF THE HOURS OF SERVICE ACT.

In view of the testimony of the several witnesses produced by the plaintiff in error to the effect that the defendant in error was relieved at Warwick at 8:45 o'clock on the morning of August 22nd, and the fact that the defendant in error himself made a written record to such relief as being at 8:45 A. M. (Rec., 81; Trans., 37) it is felt that his verbal contradiction of such record should be rejected *in toto*, and that there was in fact no violation at Warwick of the Federal Hours of Service Act.

However, assuming that the defendant in error was not relieved until 10 o'clock A. M., it then appears that his injury occurred more than 16 hours thereafter, and that between the time of such violation and of the injury, there was a period of "off duty" of more than 10 hours.

There has never been any claim on the part of the defendant in error, that his being at work at the time of his injury was in and of itself a violation of the Hours of Service Act. The plaintiff in error could not have

been subjected to a penalty in a proceeding brought against it by the United States because of the fact that the defendant in error was on duty in charge of a train at the time he was injured, inasmuch as he had been off duty for more than ten hours when he took charge of said train at Cleveland, and had been on duty but about two hours since taking such charge.

It may be claimed by the defendant in error that the entire time from the morning of August 19th, when the defendant in error was first called to deadhead to Ohio Junction, up to the time of the injury on the morning of the 23rd, should be treated as a continuous period. An examination, however, of all the evidence in the record will show that there was no violation of the Hours of Service Act in connection with any of the trips prior to that ending at Warwick on the morning of August 22nd.

The trial court ruled that "deadhead" time should not be included in computing the sixteen-hour period contemplated by the Hours of Service Act. This ruling was in accordance with the holding of the Interstate Commerce Commission in its Ruling No. 74, which is as follows:

> "Hours of Service Law. Employes deadheading on passenger trains or on freight trains, and not required to perform, and not held responsible for the performance of any services or duties in connection with the movement of the train upon which they are deadheading, are not, while they are so deadheading 'on duty' as that phrase is used in the act regulating the hours of labor."

Excluding the deadhead time shown by the evidence, there can be no claim of any violation of the Hours of Service Act, other than a single violation of some thirty minutes at Warwick on the morning of August 22nd; and this is true whether regard be given either

to the provision in the act requiring a ten-hour off duty period whenever the employee has been on duty for a sixteen consecutive hour period, or to that requiring an eight-hour off duty period where the employee has in any twenty-four-hour-period been on duty sixteen hours in the aggregate.

The evidence is undisputed that while the defendant in error was deadheading, as set forth in the record, he was without any responsibility whatever as to the movement or control of the trains upon which he was riding. (Rec., 116; Trans., 55. Rec., 117; Trans., 56.)

In the case of *Osborne's Administrator* v. *C. N. O. & T. P. Ry. Co.*, 164 S. W., 818, decided by the Kentucky Court of Appeals on March 2, 1914, it was claimed that the time between which the deceased had been notified to be in readiness to be upon duty and the time when he actually went upon duty should be computed for the purpose of determining whether the sixteen hour provision of the Hours of Service Act had been violated.

We quote from the opinion in the Osborne case, as follows:

> "The record further shows that when a railroad employe is 'deadheading,' as Osborne was in going from Somerset to Oakdale on the 16th, he does not have any duties whatever to perform in connection with the movement of the train on which he is 'deadheading'; that he really occupies the attitude of a passenger free from any care or responsibility relating to the operation or management of the train. * * *
>
> "The Interstate Commerce Commission, however, has promulgated Rule No. 74, providing that 'employes deadheading' on passenger trains or on freight trains and not required to perform, and not held responsibile for the performance of, any service or duty in connection with the movement of the train upon which they are 'deadheading,' are not

while so 'deadheading' 'on duty' as that phrase is used in the act regulating the hours of labor." This construction, although it does not have the binding force of a court decision, is yet entitled to great weight on account of the important duties this high Commission exercises in administering these remedial federal statutes, and we concur in its soundness when applied to the facts in this case."

It appears from the record herein, that the defendant in error was fully aware of his exhausted physical condition. He knew that he was unfit to assume the charge of a train at Cleveland at midnight on August 22. He did not, however, make this unfit condition known to the plaintiff in error. We refer to the evidence of the defendant in error as same appears upon record pages 130 and 131 (Trans., 63 and 64):

"Q. Now, you observed, I believe you said, that after you were called that night and on your way down, before you took charge of the train, that you stumbled or bumped against some other cars on the way down?

A. I bumped up against the car, run into the side of the cars.

Q. That was on your way down to the roundhouse?

A. That was on my way down to the yard office.

Q. To the yard office? And that was the time that you noticed that you were sleepy also?

A. Yes, sir.

Q. That was before you had registered out or taken any train at all?

A. That was after I was called. That was while I was going down.

Q. After you were called and on your way down to the yard office?

A. Yes, sir.

Q. Who did you see at the yard office when you got down there?

A. I saw the yardmaster.

Q. Saw the yardmaster?

A. And the clerk.

Q. And the clerk. Did you say to either of them anything about the fact that you were sleepy?

A. No, sir.

Q. Did you say to either of them that you had found yourself staggering and bumping against cars on the way down?

A. No, sir.

Q. Did you intimate to either of them that you thought you were not in a fit condition to take care of a train?

A. I asked the yardmaster for a pilot, that was all.

Q. For a pilot?

A. Yes, sir.

Q. You told him nothing about feeling tired nor sleepy?

A. I did not.

Q. Told him nothing about having stumbled even?

A. No, sir."

In *Smith* v. *A. T. & S. F. Ry. Co.*, 87 S. W. Rep., 1052 (Court of Civil Appeals of Texas), it appeared that a collision occurred by reason of the failure of the plaintiff, an engineer, to run his engine and train onto a side-track in order to let pass a train going in the opposite direction. The plaintiff engineer charged that his failure to observe that he had reached the switch was on account of the fact that he was in no fit condition to manage said train or to perform his duties as engineer on account of having been continuously and consecutively at work as an engineer for thirty-one hours and twenty minutes without sleep or rest, under orders from the defendant's agents and managers, and on account of which long and continuous work he had become drowsy and sleepy and was at the time he approached said switch so fatigued from the loss of sleep and rest that he fell temporarily into a doze which was unavoidable on

his part on account of the lack of sleep or rest and the continuous service which the defendant railroad had required him to perform; that he continued to perform his duties as long as he could until he was overcome by drowsiness; that he resisted the drowsiness as long as possible for him to do so.

The action was based upon a state statute limiting the hours of service, except in case of casualty, etc. The court, in deciding the case, said:

> "He (the plaintiff) knew his physical condition far better than the railway company could know it, and cannot excuse his carelessness in falling asleep on his engine while it was standing on the main track by the fact that he was requested by the master mechanic to take out a train after he had been at work for about 17 hours. Neither is it any excuse to say that he was detained longer on the trip than he expected to be by the carelessness of a telegraph operator. It may have been a violation of a statute upon the part of appellee to require appellant to work over 16 hours, unless there was actual necessity for it, and in case others had been injured through the violation of law appellee would doubtless be held liable; but appellant voluntarily acted with appellee in the violation of the statute, and will be held to have assumed all risk arising from such act."

In *Schweig* v. *C., M. & St. P. Ry. Co.*, 216 Fed. Rep., 750, the Circuit Court of Appeals for the Eighth Circuit held (752):

> "Plaintiff in error claims that Schweig fell from the engine by reason of being in a tired and exhausted condition, although there is no direct evidence that this is so, and it is very doubtful whether there was sufficient evidence to go to the jury upon this subject (*St. L. I. M. & S. Ry. Co.* v. *McWhirter*, 229 U. S., 265, 33 Sup. Ct., 852, 57 Law Ed., 1179); but we do not determine this question. Looking at the case as presented by the record, regardless of

the Hours of Service Act, and treating the case simply as one under the Employers' Liability Law (35 Stat., 65), it is clear that Schweig assumed the risk of injury by reason of the continuous hours of service, as he knew better than anybody else his own condition, and as to whether he was taking any risk in continuing to work in his then present condition, whatever it was. Therefore the verdict was rightly directed on this view of the case."

So in the case now before this court, if the defendant in error knew that the fourteen-hour off duty period which had been given him immediately prior to the commencement of the Cleveland trip was insufficient to enable him to so recuperate his powers as to be in a fit condition to take charge of a train, he should have notified the plaintiff in error of that fact. The failure to so notify the plaintiff in error was the direct cause of his injury.

He states that he did not himself know just what happened at the time of the injury. We quote from the record (Rec., 143; Trans., 70):

"Q. You do not know whether you struck the side of this car or did not strike it, do you?

A. No, sir.

Q. You do not know whether you slipped or stumbled, do you, you have no knowledge as to that?

A. I know I did not slip nor stumble.

Q. What is it?

A. Off of the footboard.

Q. No, but on the ground?

A. I do not remember after that.

Q. Your last recollection is at the time that you stepped down?

A. Off the footboard.

Q. Did you step with your left or right foot first?

A. I stepped with my left.

Q. With your left foot. And at that time do you remember whether you had your lantern in your left or right hand?

A. I do not.
Q. You have no recollection of whether that foot ever reached the ground or not?
A. I have not.
Q. Both feet had not left the footboard at the time that you last remember what took place?
A. I don't know.
Q. Whether you fell asleep there at that time or not, you don't know?
A. I don't know."

At the time of his injuries, defendant in error was not working in violation of the provisions of the Hours of Service Act; and as such injury resulted solely from his own negligence, the defendant in error is without right of recovery herein. He had no knowledge of the character of the ground between the tracks at the point in question, nor as to the width of space between the tracks. (Rec., 91; Trans., 42.) His conduct in stepping off from the footboard of his moving engine in the dark without signalling his engineer, and attempting to step into a space of which he was entirely ignorant, was not that of a reasonable man.

In the "Motion by Defendant in Error to Dismiss or Affirm, and Suggestions in Support Thereof" counsel, on page 15, stated that the undisputed facts in this case established not only liability under the second count of the plaintiff's declaration, but as contributing thereto a flagrant violation upon the part of the railroad of the sixteen-hour law.

From the testimony of the defendant in error, just above quoted, it is clear that he had no knowledge as to just what caused his injuries, or whether the closeness of the tracks had any connection whatever therewith. There is no direct evidence as to whether the defendant in error stepped from the engine at the side of the car or at the point of junction between the two cars. It ap-

pears, however, that his purpose in getting off was to uncouple the hot-box car from the car next thereto. The inference is therefore more probable that it was at the point of junction between two cars where the defendant in error stepped off. If so, the opening between the two cars made the space into which he stepped even wider than the four feet which he testified was the minimum distance between tracks theretofore noticed by him. It would seem that this inference is justifiable; and as there is no evidence that the closeness of the tracks had anything to do with causing the injuries, it necessarily follows that the negligence of Wilson in undertaking to act as conductor of a train in his tired, sleepy and exhausted condition was the sole cause of his injuries.

Whether we consider the negligence of the defendant in error in undertaking to take charge of the train at Cleveland when he knew that he was incapacitated therefor and could not keep awake, or his negligence in getting off from the footboard of his engine in the manner he did, it is clear in either instance that he brought his injury upon himself. It is no less the duty of an employee to make known to his employer his temporary incapacity to do the work assigned him, than to perform any duties which may be specifically set forth in any book of rules.

The defendant in error should therefore be precluded from recovery because of his negligence, which was alone the cause of his misfortune.

In *Great Northern Railway Company* v. *Wiles, Administrator,* decided by this court on March 20, 1916, and wherein the deceased, a brakeman, upon the train breaking in two, failed to protect the rear of the same by flagging, as was his duty, but instead remained in

the caboose where he was killed by another train running into the caboose, this court said:

> "The Supreme Court (Minnesota Supreme Court) applied the rule of *res ipsa loquitur* and justified a submission to the jury of the negligence of the railway company as a deduction from the pulling out of the drawbar, and the proportion of its causal relation to the death of Wiles to the amount of negligence attributable to him, and reversed the action of the trial court, entering judgment for the company notwithstanding the verdict.
>
> The application of the doctrine to cases like that at bar is disputable. * * * The case at bar is not solved by the doctrine. There is no justification for a comparison of negligence or the apportioning of their effect."

It is respectfully submitted that the defendant in error was not at work at the time in violation of the Hours of Service Act; that his disability was known to him, but unknown to the company; that his injury was the result of such disability, and no recovery can be had therefore.

II.

UNDER THE FEDERAL HOURS OF SERVICE ACT, AS AUTHORITATIVELY INTERPRETED BY THIS COURT, A PROXIMATE RELATIONSHIP MUST BE ESTABLISHED BETWEEN THE INJURY AND THE VIOLATION OF THE LAW, EVEN WHERE, AT THE TIME OF THE INJURY, THE VERY FACT OF CLAIMANT BEING THEN ON DUTY IS VIOLATIVE OF THE LAW.

The mere violation of the Federal 16-Hour Law does not *ipso facto* make the violator thereof an insurer of the safety of the employee after sixteen hours service have expired; nor does the mere violation of such time limit make the carrier responsible in damages for any and all injuries the employee so worked overtime

may, during such overworking time, sustain. There still remains the necessity of showing that the violation in question brought about or proximately contributed to the injury sustained.

In *St. L. I. M. & S. Ry. Co.* v. *McWhirter*, 229 U. S., 265, 57 Law Ed., 1179, the trial court, in its instructions, held that the mere violation of the statute invited the penalty prescribed, and that the offender would not be excused upon a showing of reasonable effort or diligence in attempting to comply with the statutory requirements; but upon appeal, this court, speaking through the chief justice, in commenting upon such instructions, said:

> "The ruling (of the lower court) was that by operation of law the carrier is an insurer of the safety of all his employes while working beyond the statutory time. * * * In giving to the statute the construction above stated, we think error was committed. The Hours of Service Act was approved March 4, 1907, and is entitled 'An Act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon.' We are unable to discover in the text of the statute any support for the conclusion that it was the purpose of Congress in adopting it to subject carriers to the extreme liability of insurers, which the view taken of the act by the court below imposes. We say this because, although the act carefully provides punishment for a violation of its provisions nowhere does it intimate that there was a purpose to subject the carrier who allowed its employes to work beyond the statutory time to liability for all accidents happening during such period, without reference to whether the accident was attributable to the act of working overtime. And we think that where no such liability is expressed in the statute, it cannot be supplied by implication. It requires no reasoning to demonstrate that the general rule is that, where negligence is charged, to justify a recovery, it must be shown that the alleged negligence was the proximate cause of the damage."

In the case now before the bar of this court, there was, at most, as heretofore shown, but a single violation of the Hours of Service Act, namely, the permitting or requiring the defendant in error, Wilson, to be on duty at Warwick in connection with the trip from that point to Newcastle, from 9:30 until 10 o'clock on the morning of August 22nd. There is not, however, any evidence in the entire record showing that this violation of thirty minutes in any manner brought about or contributed to the injury. It is to be noted that defendant in error's injuries occurred some sixteen hours later, and that in the interim he had been afforded an "off duty" period of about fourteen hours.

We are not permitted to go into the realm of speculation and conjecture and blindly conclude that if the defendant in error had been relieved at 9:30 A. M. instead of 10 A. M. he would not have received the injuries in question. During the thirty-minute violative period the defendant in error was not engaged in any strenuous work that might be deemed to have exhausted him physically and mentally for the next sixteen hours. On the contrary, his train was not under movement, its work at Warwick had all been done, and it was standing upon the sidetrack west of the station during all of the period, merely waiting an opportunity to proceed upon its way.

We quote from the record (Rec., 126; Trans., 61):

"Q. All the work at Warwick had been done, and it was ready to proceed, was it?

A. We were ready to go.

Q. Ready to go?

A. Yes, sir.

Q. Then, from 8:40 until the other crew took charge you had nothing to do about that train, did you?

A. I staid there.
Q. Just staid there until the other crew came?
A. Arrived, yes, sir."

It is inconceivable how anyone can claim that it was this thirty minutes of waiting on this sidetrack at Warwick that caused the defendant in error, Wilson, to be so mentally and physically exhausted that he was unable to clearly see and staggered and bumped against the cars in the Cleveland yard some fourteen hours later. The thing is unthinkable. There is no connection either in point of time or otherwise between the violation and the subsequent injury. There being no evidence of any character whatever showing a connection between the violation and the injury, the trial court erred in refusing instruction number 27, tendered by the plaintiff in error, and reading as follows:

> "The court instructs the jury that there is no evidence in the case that any violation of the Hours of Service Law proximately caused or contributed to the injuries for which this suit is brought; and you are therefore instructed that you cannot find the defendant guilty because or on account of the character or length of service in which plaintiff was engaged at and prior to his injuries." (Trans., 158.)

The *McWhirter* case is illuminating upon this point. The court said:

> "It requires no reasoning to demonstrate that the general rule is that, where negligence is charged to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage. * * *
>
> It is to be observed, however, that even if, for the sake of argument, the broad expressions of the court below and those of the trial court be so limited as to justify the conception that it was only intended to decide that permitting the working beyond the statutory time was negligence *per se*, giving rise to liability only where the proof showed a

> causal connection between the injury complained of and such *per se* negligence, the concession would not avoid the federal question or remove the error. We say this, because indulging in the assumption stated would render it necessary to determine, as previously pointed out, the federal question whether there was any evidence tending to show a connection between the asserted negligence and the occurrence of the accident. * * * Of course the inquiry whether there was any proof having such tendency is not to be solved by indulging in mere surmise or conjecture, or by resorting to imaginary possibilities, for to so do would but resolve the question back to the generic rule of liability as insurer which we have previously disposed of."

Notwithstanding the uncontroverted fact that for at least fourteen hours before going on duty on the trip on which he was injured, Wilson was not "engaged in or connected with the movement of any train," the court permitted the jury to speculate or conjecture whether there was a proximate connection between the fact "that the defendant required or permitted the plaintiff from a time during the afternoon of August 21st, 1913, until a time in the forenoon of August 22nd, 1913, for a period of more than sixteen consecutive hours, to work and be actually engaged in or connected with the movement of a train (plaintiff's instruction 1, Rec., 307; Trans., 153) and the fact that the plaintiff was injured upon a trip which began shortly after midnight on the 23rd day of August, when he was "required and permitted by the defendant to take charge of a freight train" (plaintiff's declaration, Rec., 30; Trans., 14). In other words, the jury were permitted to decide that a period of fourteen hours during which the defendant in error was relieved or not required or permitted again to go on duty was not sufficient, in view of all the facts and circumstances developed before the jury, to com-

ply with the requirements of the statute, which (as interpreted by the court below and by the attorney for the defendant in error) merely fixed a *minimum* period of relief (suggestions of defendant in error, p. 14) but leaves to the fluctuating judgment of different courts and juries the right to determine the extent to which such minimum should be enlarged because of facts and circumstances peculiar to individual cases. According to the ruling of the court below and the contention in this court of counsel for defendant in error, where a jury has decided, in view of the particular circumstances of an individual case that fourteen hours off duty is not sufficient to meet the requirements of the statute, the defendant (plaintiff's instructions 1 and 2, Trans., 152-154) cannot set up either contributory negligence or assumption of risk, although the plaintiff is fully aware of his inability to exercise care commensurate with the hazards of his occupation and does not reveal such disability to his employer who is ignorant thereof.

By the construction given by the lower court to the Hours of Service Act, ten hours is fixed as the *minimum* time off duty after sixteen hours of continuous service, but if the continuous service exceeds the period of ten hours, then the minimum off time expands elastically to cover and include the number of hours in addition to the ten hours which different juries may think different situations require. To thus permit a jury, in the exercise of its judgment and discretion, to extend a statute so as to eliminate the common law defenses of contributory negligence, and assumed risk destroys the manifest purpose of Congress as set forth in the statute and renders impossible a uniform application of the statute.

In support of our contention that there must be evidence to show a proximate relationship between the vio-

lation of the statute and the subsequent injury we call attention to the opinion of this court in the case of *A. T. & S. F. Ry. Co.* v. *Swearingen,* decided December 13, 1915, wherein it appeared that the plaintiff, while acting as a fireman, had been kept upon duty for more than sixteen hours, and while subsequently doing some oiling according to directions, fell from the running board of the pilot and was injured. There was evidence of negligence upon the part of the railroad company, but the defendant set up that the plaintiff was guilty of contributory negligence and had assumed the risk. This court, speaking through Mr. Justice Holmes, said:

> "The only matter that we have to consider here is an instruction given to the jury touching the effect of keeping the plaintiff on duty overtime upon these matters alleged by the defense.
>
> The delay that led to keeping the plaintiff on duty too long was caused by the breaking of a valve yoke, and a part of the charge was as follows: 'If, however, you believe that said breaking of the valve yoke was no such casualty or unknown and unforeseeable cause as is provided by law, that is to say, if you find that the breaking of the valve yoke could have been guarded against or foreseen by the exercise of ordinary care, then you are instructed that the law authorizes you to infer negligence on the part of the defendant at the time of plaintiff's injury, in requiring him to be on duty more than sixteen hours. And if in the breaking of the valve yoke you find no casualty or such unknown and unforeseeable cause as aforesaid, then and in that event you will entirely disregard defendant's plea of contributory negligence and assumed risk, as then the plaintiff can in no way be held to be guilty of contributory negligence in going upon the pilot while the engine was moving, nor can he in anyway be held to have assumed any of the risks ordinarily incident to his work or even open and apparent to him at the time he was hurt.
>
> The last half of this instruction was excepted to

in the presence of the jury, but the charge was not modified. It was the one instruction specifically directed to the matter of overtime. The natural understanding of it by people untrained in the law, if not by everybody, would be that the unjustified retention of the plaintiff at his work for more than sixteen hours would make the defendant liable whether the retention contributed to the injury or not. The statute that excludes the defenses of contributory negligence and assumption of risk in such a case is not the hours of labor act itself, but the subsequent Employers' Liability Act of April 22, 1908, C. 149, Sections 3, 4; 35 Stat., 65, 66. The latter has that operation only when the breach of the law contributes to the injury. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *McWhirter*, 229 U. S., 265, 279, 280. We do not think it possible to read the absolute language of the instruction as implicitly limited to such a case."

III.

BY THE HOURS OF SERVICE ACT CONGRESS HAS LEGISLATIVELY DETERMINED THE BOUNDARIES OF THE EMPLOYER'S LIABILITY FOR INJURIES CAUSED BY PERMITTING EMPLOYEES TO BE ON DUTY AN EXCESSIVE NUMBER OF HOURS.

The rule with reference to the proper construction of the Hours of Service Act must, we believe, be the same as that applicable to the Federal Employers' Liability Act. This rule has been well stated in the opinion rendered by the Supreme Court of Illinois in the case of *Staley* v. *Illinois Central R. R. Co.*, 268 Ill., 356, from which we quote (377) as follows:

"The Federal Employers' Liability Act has taken possession of—has occupied—that field for the purpose of calling into play therein this exclusive power of the Federal Government. Necessarily all common or statute law of this state on that subject has been superseded. The field of liability as to em-

ployes injured while engaged in interstate commerce on railroads is occupied exclusively by the Federal Employers' Liability Act—and that, too, regardless of the negligence or lack of negligence of either party to the litigation."

The Hours of Service Act covers every moment in which an employee is "actually engaged in or connected with the movement of any train" either by its requirement as to time "on duty" or its requirement as to time "off duty" antecedent to being thus "actually engaged in or connected with the movement of any train." It follows that to justify a claim that a violation is the proximate cause of an injury, such injury must have occurred at a time when the statute was being violated. If, as we have endeavored to point out, the plaintiff in error did not violate the Hours of Service Act by permitting the defendant in error, Wilson, to again go on duty at midnight on August 23rd, then there was no violation of statute suspending the defense of assumed risk, and Wilson's inability to perform the duty of his dangerous occupation with a degree of care commensurate with the hazard of that occupation, known to him but not communicated to his employer, defeats recovery.

The risk and hazard of "again going on duty" in the condition which Wilson so clearly understood, and in his testimony so accurately describes, was voluntarily assumed as a matter of law, and the legal consequence of such assumption can be escaped only on one condition, namely, that the statute forbade this assumption of risk by forbidding that he be again permitted "to go on duty" at the time in question. That condition, however, is wholly lacking in this case; but notwithstanding, the court permitted the jury (and the jury exercised the permission) to overrule the legislatively declared judgment of Congress that ten hours off duty is legally

a sufficient intervention to break the causal connection between previous overwork and subsequent injury.

By thus being permitted to hold that the thirty minute violation of the statute "from a time during the afternoon of August 21, 1913, until a time in the forenoon of August 22, 1913" (plaintiff's instruction, Trans., 152), proximately contributed to an injury which occurred on August 23, contributory negligence was eliminated from the case; and further, assumed risk was eliminated by plaintiff's instruction 2. (Trans., 152.)

In this connection the attention of this court is called to the case of *Erie R. R. Co.* v. *New York*, decided by this court and reported in 233 U. S., 671; 58 Law Ed., 1149, the question there involved being whether the State of New York by legislative enactment could prescribe a different day's work for block system, telegraph and telephone operators and signal men on railroads than that prescribed by the Federal Hours of Service Act. This court held that the Federal Hours of Service Act had completely covered the entire field relating to hours of labor of railroad employees connected with the movement of trains, and that the rights as well as the duties and responsibilities of carriers subject to that act must be found in the language of the act itself. This court said:

> "Regulation is not intended to be a mere wanton exercise of power. It is a restriction upon the management of the railroad. It is induced by the public interest of safety, and the 'hours of service' law of March 4, 1907, is the judgment of Congress of the extent of the restriction necessary. It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety, and of the cost and burden which the railroad must endure to secure it."

Counsel for the defendant in error in the "Motion by

defendant in error to dismiss or affirm, and suggestions in support thereof," upon page 14, commenting upon the Hours of Service Act, says:

> "There is no relationship presented between ten hours' rest and other periods 'on duty' in excess of sixteen hours. It is not contemplated by the act that ten hours rest following thirty or forty or more hours on duty renders a railroad company immune from government prosecution or civil liability for the law's violation."

It is respectfully submitted that this conception of the intent of the Hours of Service Act is radically wrong. The act, we believe, covers the entire field of the time during which an employee is engaged in the train service in interstate commerce. If, however, we are wrong in this position, and counsel for defendant in error is right, then there is no statutory provision whatever covering the length of "off duty" time which must be given an employee who has been on duty *more* than sixteen hours before he is again legally eligible for further service; and if there be no statutory provision covering "on duty" time in excess of sixteen hours, then any injury which might be sustained by the employee as the result of having been compelled or permitted to be on duty in excess of sixteen hours, could be redressed only under the provisions of the Federal Employers' Liability Act; but in such instance, there being no violation of the Hours of Service Act, the defense of assumption of risk as a bar would remain to the employer, and contributory negligence would have to be considered in diminution of damages.

Respectfully submitted,

WILL H. LYFORD,
GEORGE E. HAMILTON,
Attorneys for Plaintiff in Error.

Office Supreme Court, U
FILED
APR 20 1916
JAMES D. MAHER
CLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1915.

No. [redacted] 375

THE BALTIMORE & OHIO RAILROAD COMPANY,
Plaintiff in Error.

vs.

JAMES B. WILSON,
Defendant in Error.

In Error to the Appellate Court, First District, State of Illinois.

Reply to Suggestions of Plaintiff in Error in Opposition to Motion to Dismiss or Affirm.

MORSE IVES,
Attorney for Defendant in Error.

CHAMPLIN LAW PRINTING CO.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1915.

No. 842

THE BALTIMORE & OHIO RAILROAD COMPANY,
Plaintiff in Error.

vs.

JAMES B. WILSON,
Defendant in Error.

In Error to the Appellate Court, First District, State of Illinois.

Reply to Suggestions of Plaintiff in Error in Opposition to Motion to Dismiss or Affirm.

Although it does not appear in the record in this case, plaintiff in error presents in its suggestions (p. 2), an argument or statement made by counsel for the defendant in error in reply to the petition for certiorari in the Supreme Court of Illinois which is inconsistent with defendant in error's present contention. At that time counsel for defendant in error shared the misapprehension of counsel for plaintiff in error and assumed that the character of the case and the condition of the record was such as to permit a review thereof by this court, but afterward the opinion in *Stratton* v. *Stratton*, 239 U. S. 55, appeared in the Lawyers' Edition, Advance Sheets of the Opinions of this Court, dated Decem-

ber 15, 1915, and an examination of the record with that case and the decisions therein cited in mind compelled a different conclusion.

It is not contended that the matter thus presented has any legal relevancy, for it must be conceded that the jurisdiction of this court cannot be conferred by waiver, estoppel or even express agreement.

Plaintiff in error does not now claim that the Appellate Court below was the highest court of the state in which a decision in this suit could have been had. It merely contends in the language of *Soden* v. *Claney,* 269 Ill. 98 (plaintiff in error's suggestions, p. 22), that the judgment of the Appellate Court is *final.* The judgment of the Appellate Court, however, in any such case is *final,* even if the defeated party there fails to take any step to have the case reviewed in the Supreme Court of the state.

The only other conclusion that might be suggested by the decision cited is that the denial of the petition for certiorari is an approval of the decision reached by the Appellate Court, "and is therefore in effect an affirmance of the judgment," and that therefore this case has been decided in the Supreme Court of the state and the writ of error to the Appellate Court for that reason should be dismissed. But this court, in the case of *Norfolk & Suburban Turnpike Company* v. *Virginia,* 225 U. S. 264, "for the guidance of suitors," laid down the following rule (p. 269):

> "Where a writ of error is prosecuted to an alleged judgment or a decree of a court of last resort of a state declining to allow a writ of

> error to or an appeal from a lower state court, unless it plainly appears, on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the *Crovo* case, and shall therefore, by not departing from the face of the record, solve against jurisdiction the ambiguity created by the form in which the state court has expressed its action."

The Supreme Court of Appeals of Virginia in the above entitled cause, it appears (p. 266), "being of opinion that the said judgment or order is plainly right, * * * refused a writ of error, thereby affirming said judgment of said Circuit Court of Princess Ann county of Virginia."

Turning to the petition for certiorari to the Supreme Court of Illinois in this case (Trans. 185), it appears that the plaintiff in error sought a decision of the Supreme Court of Illinois, "and to the end that such decision may be obtained, your petitioner prays that a writ of certiorari be granted," and in response to this petition the Supreme Court of Illinois entered the following order (Trans. 175):

> "And now on this day, the court having duly considered the petition for a writ of certiorari herein, as well as the record, abstract, brief and arguments filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a writ of certiorari herein."

Therefore, we claim, the writ of error here should be dismissed, not because it is directed to the Ap-

pellate Court instead of the Supreme Court, but because the defendant in error did not take a step which it might have taken to have made the decision of the Appellate Court the decision of the highest court of the state in which a decision in the suit could be had.

II.

NO FEDERAL QUESTION, SUBSTANTIAL AND NOT FRIVOLOUS, HAS BEEN RESERVED FOR REVIEW.

The plaintiff in error makes no reply to the respective contentions of the defendant in error in this regard other than to in substance reassert (Plaintiff in error's suggestions, p. 23) its assignments of error.

1. It claims to have preserved for review the scope, meaning and application of the hours-of-service act by a requested peremptory instruction (Assignment of Error 5; Trans. 188) covering all of the counts of the declaration; although it does not claim, and there is no room for the claim, that the case should not have gone to the jury on the second count.

2. It claims to have preserved the same question for review "by a separate request for a peremptory instruction on each separate count of the declaration." Yet no error is assigned in this court upon the refusal of any one of these instructions; and if assigned, it would not avail, for the reasons stated concerning assignment 6 (Original Suggestions, pp. 11, 12).

3. It makes the same claim, "by the tendering and refusal of an instruction that the admitted facts showed no violation of the federal hours-of-service act" (Assignment 6), when, "at the same time" (Trans. 158; Rec. 328), it submitted by other instructions requested by it (Trans. 157) the same question as one of fact for the jury (Original Suggestions, pp. 11, 12).

4. It states that it preserved the same question for review "by the giving of plaintiff's instructions 1 and 2, which authorized the jury to disregard the defenses of contributory negligence and assumed risk." It assigns no error upon the giving of instruction No. 2. It did not point out in the trial or in the Appellate Court below, specifically or otherwise, anything as erroneous or improper in instruction No. 1. And further, in the respect of which it now complains of instruction No. 1, the instruction is in conformity with its own ideas given to the jury at its request by instructions 16, 19 and 20.

III.

THE UNDISPUTED FACTS IN THIS CASE ESTABLISH NOT ONLY LIABILITY UNDER THE SECOND COUNT OF PLAINTIFF'S DECLARATION, BUT, AS CONTRIBUTING TO PLAINTIFF'S INJURY, A FLAGRANT VIOLATION OF THE SIXTEEN HOUR LAW.

The plaintiff in error claims (Suggestions, p. 25) that the defendant in error is precluded from urging his right to recover, under all the evidence in (a limitation that was induced by the defendant), the case, because of the limitation of the trial court

and because no cross-errors having been assigned by defendant in error. In this plaintiff in error overlooks the assignment of cross-errors in the Appellate Court (Trans. 162; Rec. 339). Plaintiff in error asserts (p. 25) that the injury occurred more than sixteen hours after the last violation of the law and yet presents no reason, if the last violation so incapacitated the defendant that at the time he was set to work again he was incapable of caring for himself and was injured thereby, why it should be relieved from responsibility. It in no respect responds to the idea that there is no relationship in the statute between periods of employment in excess of sixteen hours and ten hours' rest.

In its suggestions (p. 4-20), plaintiff in error makes certain contentions without direct reference to the errors assigned. It says (p. 5) the second count "contains no averment that the plaintiff was in the exercise of ordinary care prior to the time of his injury; and under this count the meaning and application of the hours-of-service act is necessarily involved, because the omission from this count of any averment of the exercise of care by plaintiff must be considered in connection with plaintiff's first and second instructions." Under the statute, however, contributory negligence is a matter of defense (*Central Vt. Railroad Company* v. *White,* 238 U. S. 507, 512); and plaintiff's first instruction (Trans. 152, 153) pertains only to the hours-of-service counts, and the second instruction (Trans. 154, 155), informs the jury as to the provisions of the Employers' Lia-

bility Act, pertinent under all the evidence in the case.

In its suggestions (p. 6), plaintiff in error states that it specially requested the court to give instruction No. 27; whereas it appears from the record (Trans. 157, 158) that this instruction was not specially requested, but was tendered at the same time with its other instructions, inconsistent therewith, in that they presented the matter of the violation of the sixteen-hour law and its proximate connection with plaintiff's injury as a question of fact to the jury.

Plaintiff in error suggests (p. 9) that the doctrine of assumed risk precludes recovery in this case, unless that doctrine is removed from the case, because "the violation of a statute enacted for the safety of employes contributed to the injury." This is plainly untenable, because by the evidence in support of the second count of the declaration it appears that Wilson had no knowledge of the dangerous proximity of the tracks which contributed to his injury.

Plaintiff in error cites the case of *St. L., I. M. & S. Ry. Co.* v. *McWhirter*, 229 U. S. 265 (its suggestions, 14, 15). In that case there was no evidence to show an exhausted condition of the plaintiff, and no connection shown between the violation of the sixteen-hour law and the plaintiff's injury; whereas here, plaintiff in error states (its suggestions, p. 10) the "proximate connection between his injury and his unfitness for duty (known to Wilson and not communicated to his employer)

is clearly established by the following testimony of the plaintiff."

Plaintiff in error cites (its suggestions, 19) the cases of *Schweig* v. *C. M. & St. P. Ry. Co.*, 216 Fed. Rep. 750, and *Smith* v. *A. T. & S. F. Ry. Co.*, 87 S. W. Rep. 1052, 1057. These cases have no relevancy here, because in each of those cases the exhausted condition was a necessary requisite in the claimed right to recover, although neither case was within any statute giving such right on such ground. In the instant case, however, it was a question for the jury to say under the 2nd count, whether the dangerous proximity of the tracks was the sole cause of plaintiff's injury, or whether his exhausted condition did or did not contribute thereto; and under the hours-of-service counts his exhausted condition was relevant bearing upon the connection between the violation of the statute and his injury.

Plaintiff in error's contentions are best answered by simply applying them to facts. A conductor may be constantly employed for days in violation of the law, without sleep, and employed to the extent that he becomes physically and mentally incapacitated and if then he be given 10 hours off duty, he may again be placed in charge of a train and though still incapacitated and a constant source of danger to passengers, employes and property, injuries to any of these may not be charged to the law's violation. Again, if after days of constant work that conductor be specially ordered to ride for 10 hours on a freight train upon which there is no place for him to sleep, to a destination from which he is to take out his next train,

during such 10 hours' ride, although under pay, he is "off duty," and his employer's immunity is supplied. On and off duty means but a change in the character of employment.

These contentions are foreclosed in *M. K. & T. Ry. Co.* v. *U. S.*, 231 U. S. 112, 119; *B. & O. R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 619.

We submit that there is no contention of plaintiff in error in this case relevant either to the matter of this court's jurisdiction or to the merits of the case that is not frivolous. We therefore ask that the writ of error be dismissed or that the judgment be affirmed.

Respectfully submitted,

MORSE IVES,
Attorney for Defendant in Error.

CONTENTS.

PRESENTATION AND FINAL DISPOSITION OF QUESTIONS IN STATE COURTS 1-3

THE PLEADINGS 4-5

THE GIVEN AND REFUSED INSTRUCTIONS..... 5-6

THE TRIP ON WHICH PLAINTIFF WAS INJURED AND ITS RELATIONSHIP TO PRIOR TRIPS..... 7-9

PLAINTIFF'S TESTIMONY SHOWING ASSUMPTION OF RISK AFTER TERMINATION OF STATUTORY VIOLATION.....10-13

CONTENTIONS OF PLAINTIFF IN ERROR:

I. By the Hours of Service Act Congress has legislatively determined the boundaries of the employer's liability for injuries caused by permitting employees to be on duty an excessive number of hours..... 14

II. Under that Act, as authoritatively interpreted, a proximate relationship must be established between injuries and the violation of the law..... 14

III. By said Act Congress has legislatively determined that an employee who has been on duty beyond the statutory time may resume duty "after he has been given ten consecutive hours off duty"..... 15

IV. The purpose of Congress to make provision for the resumption of duty by employees who have been previously overworked would be defeated if carriers were held liable because of having permitted employees "again to go on duty" after having given such employees the full time "off duty" required by the statute..... 16

V. As the statute covers all the time in which an employee is "actually engaged in or connected with the movement of any train," there must be a violation of the statute existent at the time of injury to justify the claim that the violation of the statute is the proximate cause of the injury..... 17

VI. The doctrine of assumed risk is not suspended unless there be a violation of the statute continuing at the time of the injury..... 18

VII. Juries have no right to modify the provisions of the Hours of Service law by deciding that ten hours "off duty" does not, in particular cases, break the causal relationship between antecedent work and subsequent injury..... 19

REPLY TO POINTS OF DEFENDANT IN ERROR:

I. (a) This court will adopt the construction of the Illinois Supreme Court of the Illinois Practice Act..... 21

(b) The Illinois Supreme Court has decided that upon denial of writ of certiorari the decision of the Appellate Court is final..... 22

II. The following substantial and important Federal questions have been duly preserved for review:

(a) May a trainman engaged in interstate commerce and injured by reason of his exhausted condition brought about by having on a previous occasion been permitted to remain on duty in violation of the Hours of Service Act, where such exhausted condition was known to him, but unknown to his employer, recover for such injury, if, at the time of receiving same, his being on duty was not a violation of the Act?..... 23

(b) May a violation of the Hours of Service Act as to time "on duty" antecedent to the period of service on which an injury was received and separated from it by a longer period of time "off duty" than the Hours of Service Act requires, be held to be the proximate cause of such injury?..... 23

(c) May an interstate carrier permit an employee, who has been on duty continuously for more than sixteen hours, again to go on duty after having had more than ten consecutive hours off duty, when any disability to which said employee may then be subject by reason of having, on the previous trip, been on duty more than sixteen hours, is unknown to the employer?..... 24

(d) In a suit by a trainman engaged in interstate commerce, for injuries received by reason of his exhausted condition, brought about by having been on duty more than sixteen hours, and where, since the trip on which said violation of the Hours of Service Act occurred, the employee has been given more than ten consecutive hours off duty, may the court eliminate the defenses of contributory negligence and assumed risk by instructing the jury that the violation *on said previous trip* suspends the operation of the doctrines of contributory negligence and assumed risk *on a subsequent trip* on which the injury occurred? 24

(e) In such a case, may the courts submit to juries the question whether the ten consecutive hours "off duty,"

provided by the Hours of Service Act, was or was not a sufficient length of time to break the causal connection between the antecedent period of overwork and the subsequent injury, where the employer had no knowledge of the employee's exhausted condition when resuming work after the expiration of more than "ten consecutive hours off duty"? 24

III. No violation of the Hours of Service Act occurred later than ten o'clock on the morning of August 22d. The injury occurred more than sixteen hours after the last violation of law and between such violation and the injury was a period "off duty" longer than the "ten consecutive hours" required by the Act. Assumed risk disposes of the case under every count, unless that doctrine was suspended *at the time of the injury*, by a then existent violation of the statute..... 25

CASES CITED.

C. & E. I. R. R. Co. *v.* Heerey, 203 Ill., 492, 495..... 25

Erlinger *v.* St. L. & O'Fallon Ry. Co., 245 Ill., 304..... 23

Erie R. R. Co. *v.* New York, 233 U. S., 671..... 20

LaMonte *v.* Kent, 253 Ill., 330..... 23

Leffingwell *v.* Warren, 67 U. S., 2 Black, 599, 603..... 21

M., K. & T. Ry. Co. *v.* McCann, 174 U. S., 580, 586..... 21

Morley *v.* L. S. & M. S. Ry. Co., 146 U. S., 162..... 21

Provident Institution for Saving, of Boston, *v.* Massachusetts, 73 U. S., 6 Wall., 611, 630..... 21

Randall *v.* Brigham, 74 U. S., 7 Wall., 523, 541..... 21

St. L., I. M. & S. Ry. Co. *v.* McWhirter, 229 U. S, 265..... 14

Schweig *v.* C., M. & St. P. Ry. Co., 216 Fed. Rep., 750, 752..... 19

Sioux City Trust Co. *v.* Trust Co., 172 U. S., 642..... 21

Smith *v.* A., T. & S. F. Ry. Co., 87 S. W. Rep., 1052, 1057..... 19

Soden *v.* Claney, 269 Ill., 98..... 22

Staley *v.* I. C. R. R. Co., 268 Ill., 356..... 14

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1915.

No. 842

THE BALTIMORE & OHIO RAILROAD COMPANY,
Plaintiff in Error,

vs.

JAMES B. WILSON,
Defendant in Error.

IN ERROR TO THE APPELLATE COURT, FIRST DISTRICT, STATE OF ILLINOIS.

SUGGESTIONS IN OPPOSITION TO MOTION BY DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

Under Illinois practice all questions of fact are conclusively settled by decision of the Appellate Court. In this case, upon affirmance by the Appellate Court of judgment for $45,000, plaintiff in error, obedient to the statute which precludes consideration by the Illinois Supreme Court of questions of fact, filed its petition for

writ of certiorari (Trans., 176-185) in order to obtain authoritative adjudication of a question of law; viz:

Is plaintiff in error shielded from responsibility by a proper application to undisputed facts of the Federal Hours of Service Act, which was invoked by both pleadings and instructions?

To this petition the same counsel who now files in this court motion to dismiss or affirm, filed in the Supreme Court of Illinois a printed reply which concluded:

"VIII.

JUSTICE DOES NOT DEMAND A REVIEW OF THE RECORD IN THIS CASE BY THREE APPELLATE TRIBUNALS.

There are none but Federal questions in this case. The decision of the Supreme Court of the United States is alone final.

Upon a denial by this court of the petition for certiorari, a writ of error from the United States Supreme Court may be had direct to the Appellate Court for the First District of Illinois (*Chicago, Indianapolis & Louisville Ry.* v. *Hackett,* 228 U. S., 559).

We respectfully submit that the petition for certiorari should be denied."

On December 21, 1915, the Supreme Court of Illinois (Trans., 175) denied writ of certiorari, and in conformity with the mandate of said Supreme Court the Appellate Court made certificate (Trans., 191) that said Appellate Court is the highest court of law or equity of the State of Illinois in which a decision in said cause could be had and entered order allowing writ of error so as to give opportunity to present to this court the Federal questions involved. (Trans., 193.)

Before discussing *seriatim* the points suggested by defendant in error in support of motion to dismiss or af-

firm, we summarize briefly the pleadings and proof sufficiently to enable the court to pass intelligently upon our contention that "hours of service" are fundamentally involved in the question of liability or non-liability herein, that Congress has legislatively prescribed the boundaries wherein "hours of service" shall be made the basis of civil liability, that the State courts have denied to plaintiff in error the protection of the Act of Congress by permitting the jury to overrule the legislatively declared judgment of Congress that a period of "ten consecutive hours off duty" breaks, as matter of law, the causal connection between previous "hours of service" and subsequent injury.

STATEMENT.

The declaration consists of five original counts (Trans., 2-11), and one additional count. (Trans., 13-15.) All allege the engagement of defendant in interstate commerce and the employment of plaintiff as a freight conductor in such commerce. All predicate liability upon the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L., 65, Chap. 149, U. S. Comp. Stat. Supp., 1911, p. 1322), as amended April 5, 1910 (35 Stat. at L., 291, Chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324).

The first and third counts were taken from the consideration of the jury by peremptory instructions. Of the four remaining counts, three set out in minute detail the alleged exact hours when plaintiff went on and off duty on the 19th, 20th, 21st, 22d and 23d days of August, 1913, averring violation of the Federal Hours of Service Act, "so that (Trans., 14) by reason of the several violations of law by the defendant as aforesaid the plaintiff became nervous and exhausted, his senses became dulled and his judgment impaired, and while he was in this condition, shortly after midnight, and on the 23rd day of August, 1913, he was required and permitted by the defendant to take charge of a freight train bound from Cleveland, Ohio, to and through New Castle Junction, Pennsylvania, and the plaintiff took charge of said train and ran said train on said trip as far as Peninsula, Ohio, and said train was there brought to a standstill upon the main track there, and the plaintiff caused an engine to be detached from said train and caused said engine to back in and along a sidetrack there for the purpose of proceeding to the other end of said train and for the purpose of detaching a car from said train; that said side-

track was next to and adjoining the said main track upon which said train was then and there standing; that as said engine backed along said sidetrack the plaintiff rode upon the footboard at the rear of the tender of said engine and on the end of said footboard nearest the said train, and that as said engine approached upon said sidetrack near to the car of said train which the plaintiff was about to detach therefrom, the plaintiff then and there, by reason of the several violations of law of the defendant, aforesaid, and *by reason of his nervous and exhausted condition as aforesaid, was unable to protect himself from injury there* (italics ours), and he stepped off from said footboard of said engine towards said train and between said main track and said sidetrack, and he then and there struck against one of the cars of said train and was thrown against and under said moving engine, and as a direct result of the several violations of law of the defendant aforesaid he was then and there by reason of the premises greatly injured," etc.

One count (the second) makes no reference to "hours on duty" by plaintiff antecedent to the trip on which he was injured and averred negligence on the part of defendant "in constructing a certain sidetrack there unusually close to said main track." This count, however, contains no averment that plaintiff was in the exercise of ordinary care at or prior to the time of his injury; and under this count the meaning and application of the Hours of Service Act is necessarily involved, because the omission from this count of any averment of the exercise of care by plaintiff must be considered in connection with plaintiff's first and second instructions. (Trans., 152-154.)

By the first instruction given on behalf of plaintiff, the jury were advised that they should not consider plaintiff's contributory negligence on the morning of

August 23d either to defeat or diminish damages, if the jury found that a violation of the Hours of Service Act "in the forenoon of August 22nd, 1913" proximately caused the injury to plaintiff on a trip which he was permitted by the defendant to undertake "shortly after midnight, on the 23d day of August, 1913." (Trans., 14.)

By the second instruction given on behalf of plaintiff the jury were advised that an "employe shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury of such employe," the jury having already been advised by plaintiff's first instruction that the Hours of Service Act was "enacted for the safety of employes of common carriers." (Trans., 152.)

In addition to tendering and requesting the court to give a peremptory instruction as to the entire declaration, defendant, upon denial by the court of this request, tendered separate peremptory instructions as to each count of the declaration and specifically requested the court to give the following instruction which was refused (Trans., 158):

> "The court instructs the jury that there is no evidence in the case that any violation of the hours of service law proximately caused or contributed to the injuries for which this suit is brought; and you are therefore instructed that you cannot find the defendant guilty because or on account of the character or length of service in which plaintiff was engaged at and prior to his injury."

Plaintiff was injured at about two o'clock on the morning of August 23, 1913, while in charge, as conductor, of a freight train for which he was "called" at ten o'clock on the night of August 22d, having reported for duty, in response to such call, at about midnight, and hav-

ing left the terminal (Cleveland) at which he was thus called at 12:30 A. M. on August 23d. In other words, at the time of his injury, he had been "actually engaged in or connected with the movement of the train" on which he was injured about two hours.

The last time Wilson had previously been "actually engaged in or connected with the movement of any train" was 10:00 A. M. on the morning of August 22d. On the morning of August 22d, he had been relieved at Warwick of a train which had been under his charge, as conductor, for some fourteen or sixteen hours. Plaintiff testified that he was not actually relieved until 10:00 A. M. on the morning of August 22d, in which event his time on duty would be sixteen hours and thirty minutes. However, he admitted that he had recorded in his timebook the time of his relief at Warwick as 8:45 A. M. and had so reported to the company. The engineer who was relieved with plaintiff fixed the time of relief at 8:45; and the conductor who relieved him testified to 8:45 as the hour of relief, and produced his original entry made at the time. Train sheets of defendant, made up by the train dispatcher from telegraphic reports, also showed the hour of relief as 8:45 A. M.; but if, in fact, relief was not given until 10:00 A. M. on the morning of August 22d, Wilson was not, in the language of the Hours of Service Act, "permitted again to go on duty," and was not again "engaged in or connected with the movement of any train," until he reported about midnight and took charge of the train which left Cleveland at 12:30 on the morning of August 23d—*i. e.*, no matter whether the relief was shortly before or shortly after the expiration of sixteen continuous hours on duty, Wilson was (again in the language of the act) "relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty."

Notwithstanding the uncontroverted fact that for at least fourteen hours before going on duty on the trip on which he was injured, Wilson was not "engaged in or connected with the movement of any train" the court permitted the jury to speculate or conjecture whether there was proximate connection between the fact "that the defendant required or permitted the plaintiff from a time during the afternoon of August 21st, 1913, until a time in the forenoon of August 22d, 1913, for a period of more than sixteen consecutive hours, to work and be actually engaged in or connected with the movement of train" (plaintiff's instruction 1; Trans., 153), and the fact that plaintiff was injured upon a trip which began shortly after midnight on the 23d day of August, 1913, when he was "required and permitted by the defendant to take charge of a freight train." (Plaintiff's declaration, Trans., 14.) In other words, the jury were permitted to decide that a period of fourteen hours during which plaintiff was "relieved and not required or permitted again to go on duty" was not sufficient, *in view of all the facts and circumstances developed before the jury,* to comply with the requirements of the statute which (as interpreted by the court below and by the attorney for defendant in error) fixes merely a *minimum* period of relief (suggestions of defendant in error, p. 14), but leaves to the fluctuating judgment of different courts and juries the right to determine the extent to which such minimum period should be enlarged because of facts and circumstances peculiar to individual cases.

According to the ruling of the court below and the contention of counsel for defendant in error here, when a jury has decided, in view of the particular circumstances of an individual case that fourteen hours "off duty" is not sufficient to meet the requirements of the statute, the defendant (plaintiff's instructions 1 and 2;

Trans., 152-154) cannot set up either contributory negligence or assumption of risk, although plaintiff is fully aware of his inability to exercise care commensurate with the hazards of his occupation and does not reveal such disability to his employer, who has no knowledge thereof.

By the construction given by the lower court to the Hours of Service Act—*i. e.*, that such act fixes ten hours as the *minimum* time "off duty" after sixteen hours of continuous service, and then expands elastically to cover and include any additional number of hours which different juries may think particular situations require—the provision of the Federal Employers' Liability Act that an "employe shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury of such employe" is made coextensive with any situation which has given an employe what the jury considers insufficient time "off duty." Thus to permit a jury, in the exercise of its judgment and discretion, to extend a statute so as to eliminate a common law defense, destroys the manifest purpose of Congress to preserve assumption of risk as a common law defense to common law liability.

The doctrine of assumed risk precludes recovery in this case, unless that doctrine is removed from the case because "the violation of a statute enacted for the safety of employes contributed to the injury." Not only does the declaration proceed on the theory that Wilson's disability and unfitness to perform his work (known to him and undisclosed to defendant) at the time he reported for duty at midnight on August 23d, was a proximate cause of his injury (*e. g.*, the declaration charges that plaintiff "*by reason of his nervous and exhausted condition as*

aforesaid, was unable to protect himself from injury there, and he stepped off of said footboard of said engine towards said train and between said main track and said sidetrack, and he then and there struck against one of the cars of said train and was thrown against and under said moving engine"), but this proximate connection between his injury and his unfitness for duty (known to Wilson and not communicated to his employer) is clearly established by the following testimony of plaintiff (Trans., 39):

"Direct Examination.

Q. What was your condition at that time, Mr. Wilson, that is, between the time you were called and the time you left Cleveland that night?

A. I was awful sleepy and tired.

Q. Was there anything there in the yard that night that called your attention to your condition?

A. Yes, sir.

Q. What was it?

A. When I was coming from the caboose down to the yard office the head brakeman and I were walking along between the train I had in there and another one that they had brought in later, between the two tracks, and we were walking along there, and I stumbled and bumped into the side of a car in the train I brought in, and it woke me up. I had been dozing and walking along there.

Q. And after you left Cleveland did you do anything in connection with your train there?

A. Yes, sir.

Q. What did you do?

A. I had my book with the numbers of the cars on. The wheel report did not have any numbers on it. I was trying to copy the numbers off the book on to the wheel report, and when I would look down at the book to get the numbers, it looked as though there was two numbers. I couldn't get them. It was double. I had a meet order for an extra.

Q. What do you mean by a "meet" order?

A. A meet order to meet an extra train coming in the opposite direction, and I knew I didn't dare

to sit there or I would go to sleep. I had to keep awake.

Q. Did you fill out your report?

A. No, sir; I couldn't finish it. I started to do so when I was marking the report down, and I couldn't keep awake, and I went and rode on the rear platform of the caboose. (Trans., 41.)

Q. What was your condition—that is, when you were riding north on that running board?

A. I was awful sleepy and tired.

Q. Was there anything at that time that called your attention to your condition?

A. Yes, sir.

Q. What was it?

A. I could see the tail light on the rear end of the caboose. It was green. From the direction I was looking at it, I looked at it and it looked like two lights, staggery-like, like two lights, and I knew there was only one. My eyes seemed blurred. I felt I could lay right down on that footboard and go to sleep.

Cross-Examination (Trans., 63).

Q. Now, you observed, I believe you said, that after you were called that night and on your way down, before you took charge of the train, that you stumbled or bumped against some other cars on the way down?

A. I bumped up against the car, run into the side of the cars.

Q. That was on your way down to the round-house?

A. That was on my way down to the yard office.

Q. To the yard office? And that was the time that you noticed that you were sleepy also?

A. Yes, sir.

Q. That was before you had registered out or taken any train at all?

A. That was after I was called. That was while I was going down.

Q. After you were called and on your way down to the yard office?

A. Yes, sir.

Q. Who did you see at the yard office when you got down there?

A. I saw the yardmaster.
Q. Saw the yardmaster?
A. And the clerk.
Q. And the clerk? Did you say to either of them anything about the fact that you were sleepy?
A. No, sir.
Q. Did you say to either of them that you had found yourself staggering and bumping against cars on the way down?
A. No, sir.
Q. Did you intimate to either of them that you thought you were not in a fit condition to take care of a train?
A. I asked the yardmaster for a pilot, that was all.
Q. For a pilot?
A. Yes, sir.
Q. You told him nothing about feeling tired nor sleepy?
A. I did not.
Q. Told him nothing about having stumbled even?
A. No, sir.
(Trans., 70):
Q. You do not know whether you struck the side of this car or did not strike it, do you?
A. No, sir.
Q. You do not know whether you slipped or stumbled, do you, you have no knowledge as to that?
A. I know I did not slip or stumble.
Q. What is it?
A. Off of the footboard.
Q. No, but on the ground?
A. I do not remember after that.
Q. Your last recollection is at the time that you stepped down?
A. Off the footboard.
Q. Did you step with your left or right foot first?
A. I stepped with my left.
Q. With your left foot. And at that time do you remember whether you had your lantern in your left or right hand?
A. I do not.
Q. You have no recollection of whether that foot ever reached the ground or not?

A. I have not.
Q. Both feet had not left the footboard at the time that you last remember what took place?
A. I don't know.
Q. Whether you fell asleep there at that time or not, you don't know?
A. I don't know."

Much of the record and much of defendant in error's statement in this court are taken up with a detailed recital of Wilson's work from August 19th to the date of the accident—just when he was called on different dates—just what runs he made—just when and where he was relieved—just what he did while "off duty" as well as while "on duty" during this period—what part of his compensated time was made up of deadheading, *i. e.*, riding as a passenger, under pay, but having no duty or responsibility in connection with the movement of any train.

All these details, we believe, can only be appropriately discussed in a brief upon the merits; and our statement of the pleadings and of the testimony, in these suggestions, is intended merely to meet the allegation of defendant in error's motion "that the plaintiff in error reserved no federal questions for review, and that its respective contentions are foreclosed by previous decisions of this court and are frivolous."

We submit that the proper construction and interpretation of the Hours of Service Act and the proper application of its provisions to an undisputed state of facts are clearly preserved for review by this court, and that the following contentions arising under said act are neither frivolous nor foreclosed by any decision of this court, viz:

I.

By the Hours of Service Act Congress has legislatively determined the boundaries of the employer's liability for injuries caused by permitting employees to be on duty an excessive number of hours.

The rule with reference to the Hours of Service Act must be the same as the one laid down with reference to the Employers' Liability Act, and which has been correctly summarized by the Illinois Supreme Court (*Staley* v. *I. C. R. R. Co.*, 268 Ill., 356) in the following language:

> "The Federal Employers' Liability Act has taken possession of—has occupied—that field for the purpose of calling into play therein this exclusive power of the Federal government. Necessarily, all common or statute law of this state on that subject has been superseded. The field of liability as to employees injured while engaged in interstate commerce on railroads is occupied exclusively by the Federal Employers' Liability Act, and that, too, regardless of the negligence or lack of negligence of either party to the litigation."

II.

Under the Federal Hours of Service Act, as authoritatively interpreted by this court, a proximate relationship must be established between the injuries and the violation of the law, even where, at the time of the injury, the very fact of claimant being then on duty is violative of the law.

In *St. L., I. M. & S. Ry. Co.* v. *McWhirter*, 229 U. S., 265, this court, speaking through Chief Justice White, said:

> "The Hours of Service Act was approved March 4, 1907, and is entitled 'An Act to Promote the Safety of Employees and Travelers Upon Railroads by Limiting the Hours of Service of Employees Thereon.'

We are unable to discover in the text of the statute any support for the conclusion that it was the purpose of Congress in adopting it to subject carriers to the extreme liability of insurers, which the view taken of the act by the court below imposes. We say this, because, although the act carefully provides punishment for a violation of its provisions, nowhere does it intimate that there was a purpose to subject the carrier who allowed its employees to work beyond the statutory time to liability for all accidents happening during such period, without reference to whether the accident was attributable to the act of working overtime. And we think that where no such liability is expressed in the statute, it cannot be supplied by implication. It requires no reasoning to demonstrate that the general rule is that, where negligence is charged to justify a recovery, it must be shown that the alleged negligence was the proximate cause of the damage."

III.

By such act Congress has provided,—*i. e.*, legislatively determined—that "whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours, he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty."

By this provision, as we contend, resumption of duty by an employe who has been on duty beyond the statutory time is specifically authorized whenever, following service of more than sixteen hours, the employe has been given "ten consecutive hours off duty."

Recovery was permitted in the court below, upon the theory that a period of overwork terminating "in the forenoon of August 22nd, 1913," (plaintiff's instruction 1, Trans., 153) brought about a condition of exhaustion which rendered Wilson unfit to resume duty *more than*

fourteen hours after the termination of this period of overwork. If causing or permitting Wilson to go to work shortly after midnight on the morning of August 23, 1913, may properly be held by a jury to be a violation of the Hours of Service Act, and thereby eliminate from the case the defense of assumed risk (Trans., 154), it would seem that counsel for defendant in error, to be consistent, must claim that the railroad company could have been prosecuted and penalty recovered under Section 3 of the act for causing or permitting defendant in error to be in charge of the train at the time he was injured. The construction contended for by counsel for defendant in error and adopted by the court below by the first instruction given on behalf of plaintiff would eliminate all definiteness and certainty as to the time when previously overworked employees might again be permitted to resume their duties, and make liability or non-liability for criminal penalties hinge upon the varying recuperative characteristics of different employees.

IV.

Since Congress has undertaken to make provision for the resumption of duty by employes who have been previously overworked, the purpose of this provision would be defeated if carriers were to be made liable (either for damages or statutory penalty) because or on account of having permitted an employe "again to go on duty" after the lapse of the statutory period.

The statute, as we contend, covers two subjects: viz., time "on duty" and time "off duty" and provides penalties for a specified unreasonably long period "on duty," and likewise for a specified unreasonably short period "off duty." When Wilson was relieved on the morning

of August 22, any offense with reference to time "on duty" ceased—its continuity ended—liability (whether civil or criminal) for *that* offense became fixed as of the time of such relief. From that moment the operative provision of the statute, *as to future occurrences* was the one pertaining to Wilson being "permitted again to go on duty." With the ending of the violation as to time "on duty," immediately the statutory provision as to time "off duty" measured *future* duty and *future* liability as completely and exclusively as *past* duty and *past* liability were measured by the offense whose continuity was ended when Wilson was relieved.

With continuity of the offense as to time "on duty" ended by the act of relief, with a statutory obligation covering time "off duty" designed to cover *future* conduct and *future* liability, Congress has specifically defined the length of time which breaks the relationship of cause and effect between previous overwork and subsequent injury.

V.

Because the statute covers every moment in which an employe is "actually engaged in or connected with the movement of any train"—either by its requirement as to time "on duty" or its requirement as to time "off duty" antecedent to being thus "actually engaged in or connected with the movement of any train"—the statute must be violated *at the time of an injury* to justify the claim that the violation of the statute is the proximate cause of the injury.

Nevertheless by plaintiff's instruction 1 the court permitted the jury (and the jury exercised the permission given) to overrule the legislatively declared judgment of Congress that ten hours "off duty" is a legally sufficient

intervention to break the causal connection between previous overwork and subsequent injury.

By thus being permitted to hold that a violation of the statute "from a time during the afternoon of August 21, 1913, until a time in the forenoon of August 22, 1913," (plaintiff's instruction 1, Trans., 153) proximately contributed to an injury which occurred on August 23d, contributory negligence was eliminated from the case by plaintiff's instruction 1, and assumed risk was eliminated by plaintiff's instruction 2.

VI.

If, as above pointed out, defendant did not violate the Hours of Service Act by permitting Wilson "again to go on duty" at midnight on August 23d, then no violation of a statute suspended the doctrine of assumed risk, under which plaintiff's disability to perform the duty of his dangerous occupation with a degree of care commensurate with the hazard of that occupation, and which disability was known to him and not communicated to his employer, defeats recovery.

There being no question that "a condition of exhaustion contributed to the accident" (Appellate Court opinion, Trans., 187), that his unfitness for work was fully known to Wilson and was not communicated to any representative of defendant, the peremptory instruction should have been given as to every count of the declaration. The risk and hazard of "again going on duty" in the condition which Wilson so clearly understood and so accurately describes, was voluntarily assumed, as a matter of law, and the legal consequence of such assumption can be escaped only upon one condition, viz., that the statute forbade this assumption of risk by forbidding that he be

permitted "again to go on duty" at the time in question; and that condition is wholly lacking in the case at bar.

In *Schweig* v. *C., M. & St. P. Ry. Co.*, 216 Fed. Rep., 750, the Circuit Court of Appeals for the Eighth Circuit held (752):

> "Plaintiff in error claims that Schweig fell from the engine by reason of being in a tired and exhausted condition, although there is no direct evidence that this was so, and it was very doubtful whether there was sufficient evidence to go to the jury upon this subject. (*St. L., I. M. & S. Ry. Co.* v. *McWhirter*, 229 U. S., 265, 33 Sup. Ct., 858; 57 Law Ed., 1179); but we do not determine this question. Looking at the case as presented by the record, regardless of the Hours of Service Act, and treating the case simply as one under the Employers' Liability Law (35 Stat., 65), it is clear that Schweig assumed the risk of injury by reason of the continuous hours of service, as he knew better than anybody else his own condition and as to whether he was taking any risks in continuing to work in his then present condition, whatever it was. Therefore the verdict was rightly directed on this view of the case."

In *Smith* v. *A., T. & S. F. Ry. Co.*, 87 S. W. Rep., 1052, 1057, the Court of Appeals of Texas held:

> "He knew his physical condition far better than the railway company could know it, and cannot excuse his carelessness in falling asleep on his engine while it was standing on the main track by the fact that he was requested by the Master Mechanic to take out a train after he had been at work for about seventeen hours."

VII.

That neither courts nor juries have the right to enlarge upon or to take from any of the provisions of the Hours of Service Law, or to decide that ten hours "off duty" does not, in fact, break the causal relationship between antecedent overwork and subsequent injury, would

seem established by the fact that even state legislatures have no such right, although claimed as an exercise of police power.

In *Erie Railroad Company* v. *New York*, 233 U. S., 671; 58 Law Ed., 1149, the question involved was whether the State of New York by legislative enactment could prescribe a different day's work for block system, telegraph and telephone operators and signal men on railroads than the hours prescribed by the Act of March 4, 1907, known as the Federal Hours of Service Act. The court held that the Act of March 4, 1907, had completely covered the whole field relating to hours of labor of railway employes concerned with the movement of trains, and that the rights as well as the duties and responsibilities of carriers subject to that act must be found within the four corners of the act itself. The court says (683):

> "Regulation is not intended to be a mere wanton exercise of power. It is a restriction upon the management of the railroads. It is induced by the public interest or safety, and the 'hours of service' law of March 4, 1907, *is the judgment of Congress of the extent of the restriction necessary.* (Italics ours.) It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety, and of the cost and burden which the railroad must endure to secure it."

Having briefly summarized the important questions presented by the record as to the proper construction and application of the Hours of Service Law, involving the protection which it gives, as well as the liability which it creates, we take up in order the points advanced by defendant in error to support his motion.

Point I.

The denial by the Illinois Supreme Court of writ of certiorari operates as a final affirmance of the judgment, and thereby the court of last resort of the State of Illinois has denied to plaintiff in error the protection claimed under the Federal Hours of Service Act.

(a) This court will follow the construction placed by the Supreme Court of Illinois upon Section 121, Chapter 110, statutes of Illinois, as to the force, effect and finality of a judgment of the Appellate Court in cases where writ of certiorari has been denied by the Supreme Court.

In *Morley* v. *L. S. & M. S. Ry. Co.*, 146 U. S., 162, it was said:

> "The rule of construction adopted by the highest court of the state, in construing their own constitution, and one of their own statutes in a case not involving any question re-examinable in this court under the twenty-fifth section of the Judiciary Act, must be regarded as conclusive in this court. *Provident Institution for Saving, of Boston* v. *Massachusetts*, 73 U. S., 6 Wall, 611, 630. The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. *Leffingwell* v. *Warren*, 67 U. S., 2 Black, 599, 603. The meaning of a state statute, declared by the highest court of a state, is conclusive upon this court. *Randall* v. *Brigham*, 74 U. S., 7 Wall., 523, 541."

In *M., K. & T. Ry. Co.* v. *McCann*, 174 U. S., 580, 586, the court said:

> "The elementary rule is that this court accepts the interpretation of the statute of a state affixed to it by the court of last resort thereof. *Sioux City Trust Company* v. *Trust Company*, 172 U. S., 642, and authorities there cited."

(b) The Illinois Supreme Court has construed the section of the Illinois statute which is quoted in the suggestions of defendant in error as meaning that a denial by the Supreme Court of a petition for writ of certiorari operates as an affirmance by the Supreme Court of the judgment below:

In the case of *Soden* v. *Claney*, 269 Ill., 98, the court said:

> "By Section 121 of the Practice Act the judgments or decrees of the Appellate Court are made final in all cases except those wherein appeals and writs of error are specifically required by the constitution to be allowed from the Appellate Court to the Supreme Court, or in cases where certificates of importance are allowed by the Appellate Court, or in cases which the Supreme Court may require to be certified to it by *certiorari* or otherwise. The denial by this court of a petition for *certiorari* in a case not required by the constitution to be reviewed by this court and where a certificate of importance has not been issued by the Appellate Court makes the judgment of the Appellate Court in that case final. It does not follow that such a denial of a petition for the writ of *certiorari* is an approval of the reasons upon which the Appellate Court bases its judgment, but it is an approval of the conclusion reached, *and is therefore, in effect, an affirmance of the judgment.* (Italics ours.) * * * The effect of denying Claney's petition for the writ of *certiorari* was to hold that there were no probable grounds for the reversal of the judgment of the Appellate Court, so far as it affected the rights of Claney as a defendant in the original bill. The cross-errors assigned by Claney and the argument based thereon all go to that part of the judgment of the Appellate Court which affects the right of Claney as a defendant in the original bill. *These matters having been finally disposed of* (italics ours) on Claney's petition for certiorari, they will not be further considered."

As to the finality of the judgment of the Appellate Court, where writ of certiorari is denied by the Supreme

Court, see also *Erlinger* v. *St. L. & O'Fallon Ry. Co.*, 245 Ill., 304, and *LaMonte* v. *Kent*, 253 Ill., 330.

Point II.

Federal questions, substantial and important, have been duly preserved for review.

The scope, meaning and application of the Federal Hours of Service Act is clearly preserved for review by the request of defendant for a peremptory instruction on all the counts of the declaration, by a separate request for a peremptory instruction on each separate count of the declaration, by the tendering and refusal of an instruction that the admitted facts showed no violation of the Federal Hours of Service Act, and by the giving of plaintiff's instructions 1 and 2, which authorized the jury to disregard the defenses of contributory negligence and assumed risk, by permitting the jury so to interpret the Federal Hours of Service Act as to enlarge the time "off duty" which that act requires.

Some of these important federal questions (which we ask leave to elaborate by brief and argument, in regular course, in case defendant in error's motion is denied) are:

(a) May a trainman engaged in interstate commerce, and injured by reason of his exhausted condition brought about by his having on a previous occasion been permitted to remain on duty in violation of the Hours of Service Act, where such exhausted condition was known to him, but unknown to his employer, recover for such injuries, if at the time of receiving same, *his being on duty* was not a violation of said act?

(b) May a violation of the Hours of Service Act as to time "on duty" antecedent to the period of service on

which an injury was received and separated from it by a longer period of time "off duty" than the Hours of Service Act requires, be held to be the proximate cause of such injury?

(c) May an interstate carrier permit an employe who has been on duty continuously for more than sixteen hours again to go on duty after having had more than ten consecutive hours off duty, when any disability to which said employe may then be subject by reason of having, on the previous trip, been on duty more than sixteen hours, is unknown to the employer?

(d) In a suit by a trainman engaged in interstate commerce, for injuries received by reason of his exhausted condition, brought about by having been permitted, on a previous trip, to be continuously on duty more than sixteen hours, and where, since the trip on which said violation of the Hours of Service Act occurred, the employe has been given more than ten consecutive hours off duty, may the court eliminate the defenses of contributory negligence and assumed risk by instructing the jury that *the violation on said previous trip* suspends the operation of the doctrines of contributory negligence and assumed risk *on a subsequent trip* on which the injury occurred? (Plaintiff's instructions 1 and 2, Trans., 152-154.)

(e) In such a case, may the court submit to the jury the question whether the "ten consecutive hours off duty" provided by the Hours of Service Act was or was not a sufficient length of time to break the causal connection between the antecedent period of overwork and the subsequent injury, where the employer had no knowledge of the employe's exhausted condition when resuming work after the expiration of more than "ten consecutive hours off duty"?

Point III.

No violation of the Hours of Service Act occurred later than ten o'clock on the morning of August 22d. The injury occurred more than sixteen hours after the last violation of law, and between such violation and the injury was a period "off duty" longer than the "ten consecutive hours" required by the act.

Under Point III defendant in error discusses the nature and character of claimant's work beginning on August 19th, and attempts to treat the period from the morning of August 19th to the morning of August 23d as a continuous eighty-four-hour period of service; but we submit that such a discussion has no appropriate place in the suggestions in support of the pending motion, because, as stated in defendant in error's suggestions (p. 17), the trial court limited "plaintiff's right to recover, if at all, under the charge of a violation of the sixteen hour law, to the single trip from New Castle Junction, Pennsylvania, to Warwick, Ohio, during August 21st and 22d"; and no cross-errors having been assigned by defendant in error (*C. & E. I. R. R. Co.* v. *Heerey,* 203 Ill., 492, 495), the question presented on the present record pertains to the trip described in plaintiff's instruction 1 (Trans., 153), as continuing "from a time during the afternoon of August 21st, 1913, until a time in the forenoon of August 22d, 1913, for a period of more than sixteen consecutive hours."

In these suggestions we do not deem it proper to enter into a detailed discussion of just what plaintiff did from August 19th to the date of the accident, at what hour he was called on different dates, what runs he made, when and where he was relieved, what he did while "off duty" as well as while "on duty," what part of his time was

given up to waiting for trains and in "dead-heading," *i. e.*, riding as a passenger to points where he was to take charge of certain trains.

All such detail, we believe, can only be appropriately set out in a brief, if opportunity to file such brief be given by denial of the pending motion; and in these suggestions we have attempted only to point out the importance of the questions involved, which we submit justify elaboration by brief and argument in regular and orderly course.

We respectfully submit that the motion to dismiss or affirm should be denied.

William R. Calhoun
Will H. Lyford
George E. Hamilton

Attorneys for Plaintiff in Error.

FILED
DEC 4 1916
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1915.

No. 375

THE BALTIMORE & OHIO RAILROAD COMPANY,
Plaintiff in Error.

vs.

JAMES B. WILSON,
Defendant in Error.

In Error to the Appellate Court of Illinois, First District.

Brief and Argument for Defendant in Error.

MORSE IVES,
Attorney for Defendant in Error.

CHAMPLIN LAW PRINTING CO.

INDEX.

PAGE

Accident, happening of 8, 19
Appendix 43
Analysis of chronology 5, 6, 16
Assumption of risk 30-36
Beveridge, Senator, remarks of 15, 47
"Call," as commencement of duty 15
Chronology 3
Cleveland, occurrences at 18
Colloquy between Senators Patterson and Spooner 14, 54
Construction of "Hours of Service Act" 13-30
Deadheading, Wilson's orders while 15, 19
Errors relied on discussed 40
"Hours of Service Act," effect of 39
Injuries 1
Instruction 16 . . . . . 34, 38
Instruction 18 . . . . . 19, 21
Instruction 27 38
Interstate Commerce Commission Rule 47 19
LaFollette, Senator, remarks of 15, 22, 43
Map 2
"Off duty," definition of 14
"On duty," definition of 14
Patterson, Senator, remarks of 14, 54
Peninsula, condition of tracks at 8
Peninsula, plaintiff's knowledge of 7, 12
Proximate cause 36-9
Record, condition of 40
"Service," definition of 15

Spooner, Senator, remarks of 14, 54
Statement of facts 1-12
Warwick, occurrences at 6, 17
"Work," definition of 14

TABLE OF CASES.

Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission, 221 U. S. 612 25
Chicago & A. R. R. Co. v. Harrington, 192 Ill. 9 40
Chicago T. R. R. Co. v. Schmelling, 197 Ill. 619. . 38
Consolidated Coal Co. v. Haenni, 146 Ill. 614. . 40
Delano v. United States, 136 C. C. A. 243; 220 Fed. 635 26
Domanda v. Parker-Washington Co., 163 Ill. App. 158 38
Flood v. Keeley Brewing Co., 175 Ill. App. 441 40
Gascoigne v. Metropolitan El. Ry. Co., 239 Ill. 18 38
Haynes v. Century Coal Co., 171 Ill. App. 83. . . . 38
Johnson v. Southern Pac. R. Co., 196 U. S. 1. . . 14
Missouri, K. & T. Ry. Co. v. United States, 231 U. S. 112 . . . . . 15, 22
Missouri Pac. Ry. Co. v. Mackey, 33 Kan. 298. . 14
Narramore v. Cleveland C. C. & St. L. Ry. Co., 37 C. C. A. 499; 96 Fed. 298. 33
Wilson Mach. Co. v. Kurtz Auction Co., 186 Ill. App. 424 38
Northern Pac. Ry. Co. v. United States, 130 C. C. A. 157; 213 Fed. 577 26
Northern Pac. Ry. Co. v. United States, 136 C. C. A. 200; 220 Fed. 108 23
Osborne's Admr. v. Cincinnati, No. & T. P. Ry. Co., 187 Ky. 176; 164 S. W. 818 . . . . . 20, 29
Piancu v. Joseph & Co., 188 Ill. App. 555. 38
San Pedro, L. A. & S. L. R. Co. v. United States, 130 C. C. A. 28; 213 Fed. 326. . . . . 15, 20, 28

Schweig v. Chicago, M. & St. P. Ry. Co., 216 Fed. 750 34
Smith v. Atchison, T. & S. F. Ry. Co., 39 Tex. Civ. App. 468; 87 S. W. 1052 32
Spencer v. Standard Roofing Co., 163 Ill. App. 301 38
Spring Valley Coal Co. v. Robizas, 207 Ill. 226.. 38
Stickney v. Kelsey, 209 U. S. 419..... 41
Streeter v. Western Wheeled Scraper Co., 254 Ill. 244 33
United States v. Chicago & N. W. Ry. Co., 219 Fed. 342 .....17, 27
United States v. Chicago, M. & P. S. Ry. Co., 195 Fed. 783 28
United States v. Chicago, M. & P. S. Ry. Co., 197 Fed. 624 17
United States v. Grand Rapids & I. Ry. Co., 140 C. C. A. 177; 224 Fed. 667 30
United States v. Illinois Cent. R. Co., 234 Fed. 433 20
United States v. Northern Pac. Ry. Co., 213 Fed. 539 24

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1915.

No. 842.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Plaintiff in Error.

vs.

JAMES B. WILSON,
Defendant in Error.

In Error to the Appellate Court of Illinois, First District.

Brief and Argument for Defendant in Error.

STATEMENT OF FACTS.

In the Circuit Court of Cook county, Illinois, defendant in error (hereafter referred to as the plaintiff) recovered a judgment for $45,000 against plaintiff in error (hereafter referred to as the defendant). The judgment was in an action for injuries to his person, sustained at Peninsula, Ohio, August 23, 1913, and described by the intermediate reviewing court as follows (194 Ill. App. 491, 495-6; Trans. 187):

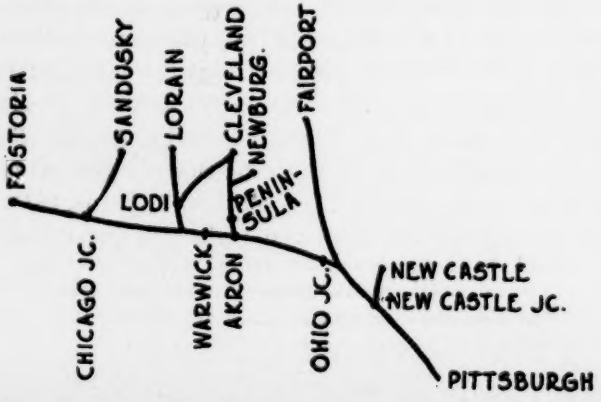
> "His brain was injured, right arm amputated, back broken, vertebrae out of alignment, cartilage between the vertebrae destroyed; ribs, left clavicle and nose were broken; muscles of the

entire right side have since become atrophied; right side of body partially paralyzed; both legs paralyzed, and many other injuries."

An appeal was taken to the Appellate Court of Illinois, First District, where the judgment was affirmed (194 Ill. App. 491), but the defendant did not ask that court to grant it an appeal to the Supreme Court of Illinois. Instead it presented to the latter court a petition for certiorari, which was denied.

This writ of error is to review the decision of the Appellate Court of Illinois, upon the theory that the petition for certiorari having been denied, that court was the highest court of the state to which the case could have been carried. It is in this connection that the failure to pray for a certificate of importance and an appeal is of vital interest.

Plaintiff was employed by the defendant as a freight conductor, and his usual run was from Newcastle Junction, Pennsylvania, which is about 60 miles west of Pittsburgh, to Chicago Junction, Ohio, some 145 miles farther west. A sketch of defendant's road may make the geography more clear, and so it is given here—not true to scale but sufficiently accurate to illumine the matter.



It will be observed that Warwick, Ohio, lies between Akron and Sterling, and that from both these latter towns lines branch off to Cleveland, Ohio, and Peninsula is on the branch from Akron to Cleveland, the length of which is about 25 miles.

The foregoing facts are undisputed, or, being geographical, are indisputable and subject to judicial notice. So we come to the chronology of the plaintiff's work for a period beginning at 2:15 p. m., on August 19, 1913, and ending with his injury at 1:45 a. m., August 23, 1913:

1913

August 19, 2:15 p. m.—Called to go west on No. 13, to meet and relieve a crew coming east (Trans. 27; Rec. 62).

(No. 13 was a mail train, due to leave Newcastle Junction at 4:15 p. m. [Trans. 27; Rec. 62]).

3:40—Reported; had time slip signed; got orders; and prepared to leave (Trans. 27-9; Rec. 63-6).

5:15—Left Newcastle Junction on No. 13, which was an hour late (Trans. 29; Rec. 66).

(His orders were to leave the mail train when notified by its conductor, who, in turn, would be notified by the train dispatcher (Trans. 29; Rec. 67).

6:05—Told to get off at Ohio Junction, Ohio; did so, and took charge of freight train. Was setting out cars, etc. (Trans. 29, 30; Rec. 68).

11:05—Left Ohio Junction (Trans. 30; Rec. 68).

August 20, 2:45 a. m.—Arrived at Newcastle Junction yards, and was called for 4 a. m. In the meantime was making reports, etc. (Trans. 30-1; Rec. 69-71).

4:00—Started west to meet and relieve a crew coming east. Traveled on a freight train (Trans. 31; Rec. 75).

5:15—Ordered off at Ohio Junction to take charge of east-bound freight. Took charge of train and left for Newcastle Junction (*ibid.*)

10:55—Arrived at Newcastle Junction (Trans. 32).

11:40—Completed duties and left yard for home.

12:05 p. m.—Arrived home, had dinner and was preparing for bed (*ibid.*).

2:15—Called for duty and ordered to go west to meet and relieve an east-bound crew at some point to be named by conductor of No. 13 (*ibid.*).

3:15—Reported at yard, did necessary preliminary work and waited for No. 13 (*ibid.*).

5:15—Started west on No. 13 to meet crew when directed (Trans. 32-3).

7:35—Ordered off at Akron Junction, Ohio, to take charge of train there, and did so (Trans. 33).

11:55—Left Akron Junction, after long delay, due to size of train (62 cars), heavy grade, necessity for getting fuel and lack of proper motive power. It took 5 engines to get the train started on the up grade there, and the extras were doled out one at a time.

At Ravenna, Ohio, there were two hot boxes on his train to be cared for.

At Niles Junction, Ohio, met a fast freight, the engine of which had a hot box. Exchanged engines and cared for the disabled engine. At Ohio Junction, Ohio, his train stalled (Trans. 33-4).

August 21, 9:10 a. m.—Arrived at Newcastle Junction, Pennsylvania (Trans. 34).

10:25—Finished making necessary reports, etc., and went home (*ibid.*).

11:15—Arrived at home and had dinner (*ibid.*).

1:00 p. m.—Went to bed (Trans. 35).

Note—This is the first time in bed since 2:15 p. m., August 19, 1913, a period of forty-six and three-quarter hours.

3:00—Called to take a train to Lorain, Ohio (*ibid.*).

Observe the 2 hours' sleep.

4:25—Reported at Newcastle Junction yards, got names of his crew and was busy preparing his train for its departure (Trans. 35-6).

6:30—Left Newcastle Junction in charge of his train (Trans. 36).

August 22, 6:05 a. m.—Arrived at Warwick, Ohio, and was put on a siding (*ibid.*).

10:00—Relieved by crew of another train with instructions to proceed to Cleveland, Ohio. This trip was made in a caboose where there was no place for plaintiff to sleep (Trans. 36-7).

10:35—Left Warwick for Cleveland (*ibid.*).

5:10 p. m.—Arrived at Cleveland, registered and did other necessary things (Trans 38).

6:10—Left yards and went to dinner (*ibid.*).

7:30—Returned to the yards and went to bed, where he slept 2½ hours (*ibid.*).

10:00—Called for Newcastle Junction (*ibid.*).

He was thus ordered to work, though having had but 4½ hours' sleep in 80¼ hours.

August 23, 12:30 a. m.—Having got his train ready, left Cleveland for Newcastle Junction (*ibid.*).

2:00—Completely ruined at Peninsula, Ohio.

A consideration of this chronology shows that during the practically 84 hours from 2:15 p. m., August 19, 1913, until the time of the injury at 2 a. m., August 22, 1913, the only times plaintiff was not hearkening to his master's voice were from 11:40 a. m. to 2:15 p. m., on August 20th, a period of 2½ hours, during which he got no sleep; from 11:15 a. m. to 3 p. m., on August 21st, a period of 3¾ hours, during which he had opportunity for but 2 hours' sleep; and from 6:10 p. m. to 10 p. m. on August 22nd, during which time he slept 2½ hours in the caboose at Cleveland.

Having been kept thus constantly occupied for 84 hours, plaintiff arrived with his train at Peninsula, Ohio, on his way from Cleveland to Newcastle Junction about 2 a. m. on August 23, 1913. While the tracks from Akron, on the main line, to Cleveland, really run north and south, they are, in railroad men's parlance, referred to as east and west. That is, going from Akron to Cleveland one is going west, and on the return one is going east.

As will be more fully explained in a later part of this statement, plaintiff, having arrived at Peninsula, found it necessary to "set out" a car which had a "hot-box," and in doing this he was injured.

This detailed chronology is made necessary by defendant's contention (Brief, p. 12) that "the only question of any violation of the Hours of Service Law is whether plaintiff was relieved on August 22nd at 8:45 a. m. or 10 a. m." The real question is whether defendant's whole course of dealing with plaintiff from 2:15 p. m. on August 19, up until the time of his injury, a period of 84 hours, was not a gross violation of the letter and spirit of the law.

As to the hour when plaintiff was relieved at Warwick, Ohio, on August 22, 1913, the testimony is that plaintiff was with his train on a siding 2 miles west of the station there (Trans. 36; Rec. 80), and his relief crew came on an eastbound passenger train (Trans. 138; Rec. 278). The conductor of the relief crew says this train arrived at Warwick "about 8:40" (Trans. 147; Rec. 295), while Wilson says it passed his train, as it stood on the siding 2 miles west of Warwick, at 8:40 (Trans. 30; Rec. 80). But whether the train arrived in Warwick at 8:40 a. m.

or passed Wilson at that time and took 4 or 5 minutes longer to arrive at Warwick, it is manifest the relief could not have taken place at 8:45 a. m., for the testimony is that Stewart, the relieving conductor, walked out to where Wilson was, at the west end of the siding (Trans. 36; Rec. 81). And the court will take notice of these facts: Stewart first had to find out where Wilson's train was; the walk out there, through the yards, would take nearly half an hour; and then there was work to be done, on records and the like, before Wilson was finally relieved.

The foregoing testimony has been stated with particular reference to the 4th and 5th counts (Trans. 7-11) and the additional count (Trans. 13-15), which are based on the "Hours of Service Law," but the second count (Trans. 5) is based upon the defendant's negligence in maintaining a sidetrack at Peninsula, which was unnecessarily close to its main track, and we turn to the testimony bearing on that count.

Plaintiff's usual run was on the Newcastle division, from Newcastle Junction to Chicago Junction, Ohio (Trans. 26; Rec. 61), and he had been over the Cleveland division, from Sterling, on his own division, to Lorain, Ohio, a distance of some 40 miles (Trans. 26; Rec. 62). Lorain is on the shore of Lake Erie, some distance west of Cleveland; and it is not, nor is it pretended it is on the same branch as is Peninsula.

Plaintiff had last been through Peninsula when he was working as a brakeman, in 1910, but had not been there since the great floods of March and April,

1913 (Trans. 44; Rec. 94-5), except for one trip in July, 1913 (Trans. 42; Rec. 91). These floods are history, their effect on the defendant's tracks is testimony.

Bergdorf, who was section foreman for defendant for 10 years before, and at the time of the floods, and had charge of all its tracks in Peninsula (Trans. 90; Rec. 184), says the tracks were put "out of commission," "they were practically all washed out" (Trans. 91; Rec. 185-6). He goes on to explain that the ballast was washed out, the main track was hanging, and the side tracks washed down against it and against one another. After the recession of the waters he lined the tracks together, and blocking them up so that trains could run over them, and no changes as to distance had been made from that time until he left the defendant's service in August 1913 (the month of the accident), nor had any been made up to the time he testified, so far as his examination showed, up until a day or two before he testified (Trans. 91; Rec. 186-7).

Plaintiff's train consisted of an engine, 5 cars, another engine and his remaining cars (Trans. 41; Rec. 88). There were 39 cars in all (Trans. 94; Rec. 191), together with the caboose. The train stopped on the main track to permit the engines to take water, and Wilson proceeded to care for the hot-boxes. One of these he "fixed up" (Trans. 40; Rec. 87), but the other was of such a nature that he decided to cut the car out of his train. This particular car was about 8 car lengths from the caboose (*Ibid.*), so to get at it Wilson had the head brakeman cut off the cars ahead of the second engine

while he cut off those behind it, then that engine pulled over the switch, and passed down the side-track along the train (Trans. 41; Rec. 88-9).

Apparently the plan was to cut the train just ahead of the "hot box" car, attach the engine to the caboose, and make the switch.

Plaintiff having his lantern, got upon the foot-board at the rear of the engine, and they backed along the train until about 5 or 6 car lengths from the "hot box," when the steam was shut off and the engine "drifted" (Trans. 41, 131; Rec. 89, 265). When it reached the "hot box" the speed was about an ordinary walk (Trans. 41, 152; Rec. 89, 304). Here plaintiff stepped off the running board and almost stepped into eternity.

The distance between the main track and the side track, and the condition of the intervening space is vividly described by the witnesses.

Clearfoss was the brakeman on plaintiff's train, and having the steadiest nerves of any of the crew to him was delegated the task of caring for the injured man (Trans. 109; Rec. 223). His testimony is that the ground was "rough, very uneven; the slag was there, in hills and hollows as near as I can explain it to you, in piles" (Trans. 110; Rec. 224). He had the caboose pulled on to the siding to take plaintiff to Akron, and when going to where the injured man lay had to pass between the engine and caboose on the side track, and the cars on the main track. (*Ibid.*) His experience is perhaps best told in the question and answer form (Trans. 110; Rec. 224-5):

"Q. Did you notice what distance there was between them there?

A. Just this way (indicating), so that I turned my shoulders this way (indicating sideways), when I started to walk in between.

Q. That is, you turned your shoulders sideways?

A. Yes, sir, to clear, so that I would not tear my clothes on anything sticking out on either the car or the engine.

Q. And as you walked you would strike on either the engine or the car—

A. Yes, sir.

Q. — or anything else?

A. No, you would not strike on anything else, but you would probably hit one or the other in the motion of your walk."

Williams, the conductor who was brought from Akron to take charge of plaintiff's train after the accident, says the clearance between a car on the siding and one on the main track was between a foot and two feet (Trans. 94; Rec. 93), and that the ground between the tracks was rough—they had been unloading slag there, and it lay loose (Trans. 95; Rec. 194).

Briggs, the engineer of the engine, on the footboard of which plaintiff took his last journey as a railroad man, says the space between his engine and the train "was not very wide," and that "it was not as wide as it is in some places." As for the ground, he describes it as "kind of rough and uneven" (Trans. 102; Rec. 207).

These three witnesses were in the defendant's service at the time they testified, and their evidence as to conditions at Peninsula at the time of the acci-

dent speaks more convincingly than volumes of field notes made long after the event—or even in the cold, gray light of the morning after.

The clearance between cars, on the Newcastle division, and indeed the usual clearance, is given by plaintiff as about 4 feet, and never less than 3½ feet (Trans. 42; Rec. 90-1). Bergdoff says the standard guage was 13-foot centers—that is 13 feet from the center of the main track to the center of the siding, and the tracks on each 4 feet 8½ inches (Trans. 90; Rec. 184), which leaves a space of 9 feet 3½ inches between the near rails of the siding and the main track. Allowing a 2½-foot overhang on each car, we have the 4-foot clearance plaintiff speaks of.

Williams says that on the Newcastle division, the one on which he and plaintiff ran, the distance from center to center was 14 feet (Trans. 95; Rec. 194). Matthews, a former conductor and brakeman for defendant on the Newcastle & Cleveland divisions, gives the distance between the near rails of siding and main track as 9 feet (Trans. 98; Rec. 199).

Thus it appears the tracks at Peninsula were abnormally close. It is not contended that any change was made in the position of the tracks between the time of the injury and the time the witnesses testified, yet Huber, measuring from the center of one near rail to the center of the other, found that, at the 14th rail from the frog of the north switch, the distance, 6 feet 9 inches, at the end of the 15th rail it was 6 feet 7½ inches, and at the 16th rail, 6 feet

8½ inches. These measurements were taken at or about the scene of the accident, and disclose a scant clearance.

It is not even suggested that plaintiff knew anything about this condition of affairs, the only apparent attempt at a defense to this count being that he knew he was tired and sleepy because of the labor he had been compelled to undergo, and assumed the risk of that condition. How well this comports with the contention that there was no violation of the "Hours of Service Law," is a matter to be taken up elsewhere.

BRIEF AND ARGUMENT.

The facts and law showing the defendant has no standing in this court have been commented upon in the "Suggestions" made in support of the motions to dismiss or affirm, and while that matter will be touched upon later, it seems best to deal first with the merits of the case in reply to defendants' brief and argument.

Since counsel begin and end their point I with the contention that, at the time of his injury, plaintiff was not "at work" (Brief, pp. 21, 30) in violation of the "Hours of Service Act," it will be argued first that, under a proper construction of the act, as applied to this case, he was "on duty." The question of assumed risk will then be taken up and thereafter counsel's argument, as presented, will be followed, and in conclusion the state of the record presented.

I.

AT THE TIME OF HIS INJURY PLAINTIFF WAS ON DUTY IN VIOLATION OF THE "HOURS OF SERVICE ACT."

A reading of the declaration shows that the hours of service counts were drawn upon the theory that the act had been continuously violated from 2:15 p. m. on August 19, 1913, until plaintiff's injury 84 hours later, and the testimony was put in without objection upon this theory.

The "Hours of Service Act" applies to "persons actually engaged in or connected with the movement of any train," and as to them makes it unlawful for the employer to require or permit them to be or remain "on duty" for a longer period than 16 consecutive hours, and commands that they, having been "on duty" for 16 hours continuously, "shall be relieved," and not required or permitted again to go "on duty" until after "at least" 10 consecutive hours "off duty."

The words "on duty" mean more than "at work," and were used advisedly in the statute. In the Congressional Record for January 9, 1907 (to which the court may refer, *Johnson* v. *So. Pac. R. Co.*, 196 U. S. 1, 19), appears a short colloquy between Senators Patterson and Spooner in which the difference between these phrases was pointed out (Vol. 41, Pt. 1, p. 826). The Century Dictionary defines the noun "work" as meaning "active operation." Murray's Dictionary defines the phrase "on duty" as being "engaged in the performance of one's appointed service or task," as "on duty with his regiment," and "off duty" as being "the opposite of this; not officially engaged," while the Century uses an illustration of "on duty" the phrase "the regiment did duty in Flanders."

In *Mo. Pac. Ry. Co.* v. *Mackey*, 33 Kan. 298, 315, HORTON, C. J., after quoting from lexicographers, said:

> "When we speak of duty as applied to a servant or employe, the matter involves his service or business."

This leads to the word "service," and it Murray defines as "the work or duty of a servant; the action of serving a master," while the Century gives its meaning as "the act of service or attendance in any sense; the rendering of duty to another; obedience; the performance of any office or labor for another."

While Wilson was "dead-heading" from Newcastle to Ohio Junction on August 19th and 20th, he was subject to be ordered off at any point which the train dispatcher might indicate to the conductor of the trains on which he rode, and the same is true of his trip from Newcastle Junction to Akron Junction on the 21st (Trans. 29, 31, 33; Rec. 67, 71, 74), and he was under pay. In view of these facts, it would seem idle to contend that he was not "on duty" and serving the defendant, just as much as while he was waiting at Newcastle Junction for the trains to take him out. (*San Pedro L. A. & S. L. R. Co.* v. *United States,* 130 C. C. A. 28, 31; 213 Fed. 326, 329.) To adapt the language of this court in *Missouri K. & T. Ry. Co.* v. *United States,* 231 U. S. 112, 119, he was under orders, liable to be called upon at any moment, and not at liberty to go away. He was none the less on duty when inactive. His duty was to stand and wait.

From a reading of the speech delivered in the senate on January 9, 1907, by Senator La Follette, who was in charge of the bill (Cong. Rec., Vol. 41, Pt. I, pp. 812-3) it may readily be concluded that a man was considered to be "on duty" from the time he is "called" until his final relief. In citing to the senate a few illustrative cases of accidents due to excessive

hours of service, he 20 times dates the expiration of the man's rest from his "call to duty," and in his remarks he twice uses this as the starting point of duty. He does not use any other datum post. And since the senator was reading from reports made by the railroads themselves, it may be inferred that is their idea of when a man's period of duty begins. This portion of the speech is printed as an appendix to this brief, along with the colloquy between Senators Spooner and Patterson.

According to this interpretation, plaintiff's hours of duty began when he was "called" at 2:15 p. m. on August 19th. But if the time when he reported at the yards in Newcastle Junction be taken as the starting point, it will be found he was "on duty" from 3:40 p. m. on the 19th, until 11:40 a. m. of the 20th—a period of 20 hours. He then left the yards for his home. Defendant knew plaintiff lived in Newcastle, and had to take a train between his home and Newcastle Junction (Trans. 50; Rec. 106), a distance of 3 miles (Trans. 113; Rec. 230), so it gave him time to get home and have dinner, before it called him again at 2:15 p. m., less than 3 hours after he had checked in, and less than 2 hours after he got home—but in time to catch the train for Newcastle Junction. Defendant knew this man, who had been on duty for 20 hours, could not have had a wink of sleep.

He reported again at 3:15 p. m. on the 20th, and returned from his run, and turned in his reports at 10:25 a. m. on the 21st, a period of 19 hours and 10 minutes, so defendant knew he had been at work for over 39 hours without sleep, and if the time between his being called and his reporting at the yards be

included, he had been under its orders for 41 hours and 35 minutes, the bondage being broken for 2 hours and 35 minutes—long enough to go home for dinner. Since the time allowed trainmen for meals is not to be deducted in computing the time of service (*United States* v. *C. M. & P. S. Ry. Co.*, 197 Fed. 624, 627; *United States* v. *Chicago & N. W. Ry. Co.*, 219 Fed. 342, 343), it may well be said that, despite defendant permitted plaintiff to leave the yards, and then called him again as soon as he had his dinner—despite this interruption, he was "on duty" the whole 44 hours.

At 10:25 a. m. on August 21st, plaintiff completed his work in connection with turning in his reports, etc., went home again, had dinner, and at 1 p. m. (which was an hour and three-quarters after he got home) he finally got to bed, only to be called again two hours later. This conduct completely corroborates plaintiff's statement (Trans. 53; Rec. 112):

> "I would mark (on the register) for ten hours' rest, but it would not do any good, they would call you right away."

To return to August 21st. At 4:25 p. m., after having been absent from the yards 6 hours, plaintiff reported in obedience to the call, that is he arrived at the yard and walked over to the roundhouse, which took 10 minutes, and there registered. He prepared his train and took it out at 6:30 p. m., arriving at Warwick, Ohio, at 6:05 a. m. on the 22nd. The train was put upon a sidetrack, and plaintiff remained in active charge of it until he turned it over to Stewart. According to plaintiff's testimony this took place at 10 a. m., which

meant a period of 17 hours and 35 minutes from the time he arrived at the yards in Newcastle Junction, or 10 minutes less if the time he put his name on the register be taken as the starting point. Stewart says he relieved plaintiff at 8:45 a. m., but even this leaves him on duty more than 16 hours, at the time Stewart took over the train.

When Stewart took over the train he showed plaintiff a message directing him to take his crew and proceed to Cleveland on that train. As soon as plaintiff turned the train over to Stewart and got his orders, which was beside the engine, he went back to the caboose. In this there were 4 bunks, one of which was broken and filled with drawbars, knuckles and joints, while the other 3 had cushions on them and were occupied by the brakeman, the head brakeman and the fireman of his crew (Trans. 37-8). This made it impossible for plaintiff to lie down, so he made the trip to Cleveland on the rear end of the caboose, and improved his time by learning the road. The train reached Cleveland at 5:10 p. m. (Trans. 38), more than 24½ hours after plaintiff had reported at Newcastle Junction. Plaintiff registered, got his time slips signed and at 6:10 p. m. left the yard for dinner. Returning about 7:30 p. m., he went to bed in the caboose, but was called at 10 p. m., for Newcastle (Trans. 38). Thus he had had 2½ hours' sleep from 3 p. m. the day before, when he was called at his home—a period of 31 hours. He took his train out and 4 hours after he was called he was injured.

During all the time from the hour he reported on August 21st (4:25 p. m. or 4:35 p. m.) until he

was injured, plaintiff was under pay, and subject to the orders of defendant. He was a freight conductor, whose only duties were in and about the movement of freight trains, and he was ordered from Warwick to Cleveland for the purpose of moving a freight train which pulled out of the station a few hours after he got there. Why was he under pay if he was not "on duty"?

He was not free to do as he chose, he was subject to orders, and indeed, might have been ordered off at any point between Warwick and Cleveland to take charge of a train. It seems clear he was "on duty," within the meaning of the "Hours of Service Act." He was "on duty" practically all the time from his "call" at 2:15 p. m. on August 19th until his injury.

The trial court gave the jury the following instruction (Trans. 157):

> "18. The court instructs the jury that railroad employes dead-heading on trains and not required to perform, and not held responsible for the performance of any service or duty in connection with the movement of the train upon which they are dead-heading, are not, while so dead-heading 'on duty' as that phrase is used in the act regulating the hours of labor."

This instruction is practically a verbatim copy of the Interstate Commerce Commission's ruling 74, and, with all due deference to the Commission, it is erroneous. The closing paragraph of the argument on this point (Brief, 30), begins:

> "It is respectfully submitted that the defendant in error was not at work at the time in violation of the Hours of Service Act."

This shows counsel would have the court consider "duty," "service" and "work" as synonyms, which is the basic error of the rule and the instruction.

Of course, the ruling of the Commission is not, and cannot, be binding on the courts in the interpretation of the act. "It is the obvious duty of the court to give effect to what it conceives to be the true construction of the act of congress." (*San Pedro L. A. & S. L. R. Co.* v. *United States*, 136 C. C. A. 343, 351; 220 Fed. 737, 735.) (See also, *United States* v. *Illinois Cent. R. Co.*, 234 Fed. 433, 435; *Osborne's, Admr.* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 187 Ky. 176, 187, cited by defendant.)

The instruction, like the rule, confounds "work" with "duty" and "service." As has been seen the two latter words are practically synonyms, and are very distinct from "work," which implies active operation, while the other two imply a condition which may demand absolute passivity. The policeman held in reserve in the squad-room is "on duty," his fellow traveling his beat, is "at work." So, of the fireman in the engine house, and at a fire, and the soldier in the guard room and on sentry go; and so, of the railroad employe under orders, and the one handling a train.

This confusion of terms appears in the last seven words of the rule, which refer to the statute as "the act regulating the hours of labor," using "labor" as synonymous with the word "service" in the title of the act. They also serve who only "stand and wait."

It appears again in the phrase "not required to perform, and not held responsible for the performance of any services or duties in connection with the movement of the train upon which they are dead-heading." This implies that a man is not "on duty" unless he is actively engaged in the movement of the train—that is "at work"—the very idea rejected in the Senate. In addition, it ignores the plain language of the statute, which defines "employes," within its purview, as being those "actually engaged in or connected with the movement of any train." By the instruction (and the rule) the words "or connected with" are read out of the statute, and the words "service" and "duty" made synonyms of "work."

Applying the instruction and rule to the facts of this case the error becomes glaringly apparent. Plaintiff was "called" to take a train from Newcastle Junction, Pennsylvania, to Lorain, Ohio (Trans. 35; Rec. 78). About midway of his trip he receives an order from his employer, to leave that train and go to Cleveland for the apparent purpose of taking charge of another. Was he not in the "service" of his employer as he rode to Cleveland? If he was not, why was he paid for his time? Had not his employer authority to order him to take charge of a train at any point between Warwick and Cleveland? When he got to Cleveland, was he not still under orders?

The very object of the "Hours of Service Act," was to give the employe a certain period of time when he would be free from the orders of his em-

ployer, and the temptations of his own nature. For, as Senator La Follette pointed out (Cong. Rec. Vol. 41, pt. 1, p. 813):

> "The desire on the part of the railway employe to have a good standing with those who are immediately in authority over him, those who issue the calls for him to go on service, and who have to do directly with his promotion * * * will inevitably force men, even against their will, against their better judgment, to comply with every call that is made."

Here is the key to the provision that it "shall be unlawful" for the employer "to require or permit" the resumption of service without the prescribed time "off duty." Certain it is that the lawmakers never contemplated a condition where a man was "off duty" and at the same time under orders. The intention was to provide for a continuous period of 10 hours (or 8 in some cases) during which the master could not say "come," and the servant had to come, nor say "go," and the servant had to "go." "I say to this man, Go, and he goeth; and to another, Come, and he cometh; and to my servant, Do this, and he doeth it," has its limitations.

While the exact question now presented has never been passed upon, the decisions so far rendered point inevitably to the conclusion here urged —a man is "on duty" from the moment he is "called" until the company releases all right to dictate his movements.

The language of this court in *Missouri, K. & T. Ry. Co.* v. *United States*, 231 U. S. 112, 119, has already been referred to and here we again adapt it

to the case in hand. Plaintiff was under orders, liable to be called at any moment, and not at liberty to go away. He was none the less on duty when inactive. His duty was to stand and wait.

From 2:15 p. m., on August 19, 1913, until his physical ruination at 2 a. m., on the 23rd of that month, the periods when plaintiff was not "under orders," when he was "at liberty to go away," when he did not have to "stand and wait," are given in the record as follows: from 11:40 a. m. to 2:15 p. m. August 20th, and from 10:25 a. m. to 3 p. m. on August 21st, a total of 7 hours and 10 minutes out of 84 hours; and of these he had only 2 for sleep. The time he slept in the caboose at Cleveland (2½ hours) does not count, because he was "on duty," and had to sleep "with one eye open" and "his boots on," as the sayings go.

In *Northern Pac. Ry. Co.* v. *United States,* 136 C. C. A. 200, 202; 220 Fed. 108, 110, affirming 213 Fed. 539, the stipulated facts were that a train crew went "on duty" at 5:30 a. m.; their train was ordered to leave at 6 a. m., but was delayed 45 minutes; at 8:25 a. m. the crew "went off duty at a way station, being dismissed for a definite period, viz., until 10 a. m., as their train was necessarily held up to permit others to pass, during which time the train was placed in charge of a watchman (213 Fed. 540); they returned to duty at 10 a. m. and remained on duty until 11 p. m. If the hour and a half relief at the way-station was to be included in the "hours of service" the act had been violated, otherwise not. In sustaining a conviction under section 3 of the act, the court said:

> "The sole question in the case is whether the temporary release of the crew from duty broke the continuity of its service within the meaning of the statute. We are of the opinion that it did not, and think, that such is the effect of the decision of the Supreme Court in the case of *Missouri, K. & T. Ry. Co.* v. *United States,* 231 U. S. 112; 34 Sup. Ct. 26, 58 L. Ed. 144. The run of the crew was not ended; it remained *the* crew of the train, temporarily relieved because of delays, * * * liable to be called at any moment, and not at all, as said by the counsel for the plaintiff in error, 'at liberty to go away if they wished.'"

So here. The run of plaintiff and his crew was not ended, though temporarily relieved from work, because of the defendant's desires, they were still the crew of a train, liable to be called at any moment, and not at all at liberty to go away if they wished.

It is very evident that in the stipulation in the case cited, the words, "off duty" were used as synonymous with "not at work," but the decision of the Court of Appeals effectually destroyed that illusion, at least so far as the Ninth Circuit is concerned.

In the opinion of the District Court in the case under discussion it is said (213 Fed. 540): "The release was of no benefit to the crew, and could serve no substantial purpose except to obviate the penalty imposed by law." The same may be said of every so-called "release" plaintiff had. The test is not whether a man may sleep if he so desires, it is was he "off duty." If he was not "off duty" the master is liable, though the employe had op-

portunities to and did sleep; if he was "off duty" the master is not liable, though the employe never slept a wink, but spent all his time in some employment other than the master's, or in carousing. Release from control is the thing.

But if it be assumed opportunity to sleep is the thing to be considered, even that was not afforded plaintiff. He was ordered to dead-head, with his crew, to Cleveland on the train he had brought from Newcastle Junction, and in the caboose of this train there were but 3 available bunks. The crew consisted of an engineer, a fireman, two brakemen and plaintiff (Trans. 37). The defendant had furnished a caboose which would permit but 3 of them to sleep. The conductor, being in charge of the train, would naturally and necessarily be the last man to have an opportunity of turning in, so the defendant may fairly be held to have known he had no chance to sleep. At all events it knew two men must go sleepless. Did it comply with the law when it gave plaintiff a chance to stand up and learn the road from Warwick to Cleveland? Did not an honest attempt to comply with the law demand that if plaintiff was ordered from Warwick to Cleveland he be given 10 hours of complete liberty at one point or the other?

In the celebrated case of *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612, 619, this court, in discussing and upholding the "Hours of Service Act" said:

> "If then it be assumed, as it must be, that in the furtherance of its purpose congress can limit the hours of labor of employes engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging

> the period of service through other requirements of the carriers, or by the commingling of duties relating to interstate and intrastate operations."

The case cited denounces just the thing sought to be done in the case at bar. Here is an attempt to prolong "the period of service through other requirements of the carrier." Plaintiff was "called" to take a train from Newcastle Junction, Pennsylvania, to Lorain, Ohio, and when it called him for and sent him on that duty defendant knew the distance to be covered, the schedule to be kept and the work to be done on the way. It knew the train in plaintiff's charge could not reach Lorain within 16 hours of its departure from Newcastle Junction, so it ordered him off that train at Warwick, and "through other requirements" sought to defeat the act and bring to naught the power of congress.

In commenting on this decision in *Northern Pac. Ry. Co.* v. *United States,* 130 C. C. A. 157, 160; 213 Fed. 577, 580, the Circuit Court of Appeals said the conclusion to be drawn from it is, "that the intent of the act was and is to compel rest for each member of the train's crew at the termination of the 16-hour period." The man in the trenches may sleep—he does not rest. The man compelled to stand up on the rear end of caboose neither sleeps nor rests.

The matter is very well put by Judge Baker in *Delano* v. *United States,* 136 C. C. A. 243; 220 Fed. 635, which was a case of a train dispatcher who was worked as such, for 6 hours, and then used for 5½ hours in other capacities. The employer argued that since he might be employed by some theatre as

a ticket seller, or some telegraph company as a lineman, after he ceased to work as a dispatcher, there was no reason why he should not be employed in railroad work not in any way connected with the movement of trains. This argument was held to be subversive of the intent of the act, and to lead to its re-writing so as to include the words within the parenthesis in the following quotation from the opinion (136 C. C. A. 244; 220 Fed. 636):

> "To justify defendants' claim, the statute should read that:
>
> "'No train dispatcher shall be required or permitted to be on duty (as a train dispatcher) for a longer period than nine hours in any twenty-four-hour period (but after he has been relieved as a train dispatcher the carrier may require him to serve as a ticket seller, provided he be given eight consecutive hours off duty.'"

So, in the case at bar. In order to justify defendant's position, the statute must be made to read:

> "It shall be unlawful for any common carrier to require or permit any conductor to be or remain on duty as a conductor of any particular train for a longer period than sixteen consecutive hours, but, when he has been on duty as the conductor of a particular train for sixteen consecutive hours, he may be thereafter continued on duty indefinitely as a conductor at large."

In *United States* v. *Chicago & N. W. Ry. Co.*, 219 Fed. 342, 343, the office hours of certain telegraph operators were 15 hours a day, with 2 hours off for meals, but at meal-times they were subject to call in case a train arrived. Because the operators were always subject to call, it was held they were "on duty" during meal-time, and the company was convicted.

The thing which was determinative in the case just cited was the fact the men were subject to orders—that is "on duty." Except for the two brief visits plaintiff made to his home, when was there a moment during the whole 84 hours that he was not subject to orders?

In *San Pedro, L. & S. L. R. Co.* v. *United States*, 130 C. C. A. 28; 213 Fed. 326, after 16 hours of service the train was tied up, and all the crew, except the fireman, relieved from duty. The fireman was required to watch the engine and keep it alive until another crew arrived to take over the train. Now, it will be observed the fireman was not engaged in running the train, he had nothing to do with and no responsibility for its propulsion, and "it was not intended he should have any responsibility for the movement if occasion arose" (130 C. C. A. 29; 213 Fed. 327). It was held the company was liable for the penalty, the court saying that, while watching, the fireman was "performing a duty in connection with the movement of the train" (130 C. C. A. 31; 213 Fed. 329).

Is the matter not the same here? The fireman was waiting for the train to move (as were the trainmen in *United States* v. *Northern Pac. R. Co.*, 213 Fed. 539, *supra*), while, on his trip from Warwick to Cleveland, plaintiff was waiting to move a train. What is the difference?

In *United States* v. *Chicago, M. & P. S. Ry. Co.*, 195 Fed. 783, 785, this language is used:

> "An employe is on duty when he is at his post in obedience to rules or requirements of his superior, and ready and willing to work whether

> actually at work or waiting for orders. * * * The words 'on duty' seem to have been intelligently chosen."

The only case cited in support of defendant's position that time spent dead-heading is not to be included in the employe's hours of service is *Osborne's Admr.*, v. *Cincinnati, N. O. & T. P. R. Co.*, 158 Ky. 176, 185-8; 164 S. W. 818, 822-3. In that case Osborne had dead-headed from one point to another, under orders, to meet and take over a train. If the time spent dead-heading were to be included in his hours of service there had been a violation of the act, otherwise not. The pith of the decision on this point lies in the following quotation (158 Ky. 187; 164 S. W. 823):

> "In carefully chosen words it (the act) describes an employe as a person who is 'actually engaged in or connected with movement of any train,' and the hours of service feature of the act only apply to such a described person. Manifestly, Osborne was not actually engaged in or connected with the movement of the train on which he was 'dead-heading,' because the uncontradicted evidence is that he had no duties of any kind or character to perform in connection with the movement of this train, and was not charged with any responsibility in relation thereto."

And the court goes on to point out that Osborne could not "have been engaged in or connected with the movement" of the train he was going to meet, because it did not start for some time after he arrived.

The decision is based wholly upon ruling 74 of the Interstate Commerce Commission, which has been

dealt with above, and is subject to the same criticisms. It absolutely nullifies the words "or connected with" so far as trainmen are concerned, and is, in effect, a holding that, as to them, there can be no recovery unless they are "actually engaged in" the movement of a train for more than 16 hours. It is the confounding of "labor" and "work" with "duty" and "service."

If men may be kept dead-heading over the face of the earth, "under orders" and "not at liberty to go away," but compelled to "stand and wait," then the "Hours of Service Act" becomes a legislative Dead Sea apple, and in the words of the Circuit Court of Appeals in *United States* v. *Grand Rapids & I. Ry. Co.*, 140 C. C. A. 177, 180; 224 Fed. 667, 670:

> "If such a practice can be indulged in at all, it is not easy to perceive where legislation is to end and observance of the legislative enactment is to begin."

II.

PLAINTIFF DID NOT ASSUME THE RISK.

If it be true that plaintiff was "on duty" when he was dead-heading from Warwick to Cleveland, there can be no doubt but that the "Hours of Service Act" was violated. The violation was the more gross if, as is believed to be the case, plaintiff's whole service, from the afternoon of August 19, 1913, up to the time of his injury, is to be considered as a unit.

But, however the law may be construed on these points, there was an absolute violation of the act on the trip from Newcastle Junction to Warwick.

By instruction number 19 (Trans. 157), given at defendant's request, the trial court told the jury that if they believed plaintiff was "relieved" at Warwick on August 22nd, at 8:45 a. m., there was no violation of the act.

The evidence is that plaintiff was "called" on August 21st, at 3 p. m., got to Newcastle Junction at 4:25 p. m. (Trans. 35). His call was to leave at 5 p. m. (*Ibid.*), and he was busy and under pay up until his train actually left at 6:30 p. m. (Trans. 36), from 4:25 p. m. to 8:45 a. m. is 16 hours and 20 minutes. It appears that when plaintiff arrived at the Newcastle Junction yards he walked over to the roundhouse to register, which took about 10 minutes (Trans. 113; Rec. 230), making it 4:35 p. m. From then until 8:45 a. m. was a period of 16 hours and 10 minutes, with no dead-heading time included, and so the law was violated.

But, at defendant's instance, the court, by instruction 18, submitted to the jury a pure question of fact —was plaintiff "relieved" at 8:45 a. m., as claimed by defendant, or at 10 a. m., as he testified? On this submission the jury found that 10 a. m. was the hour. So, assuming that turning over the train to another conductor was, under the circumstances, a relief, within the act, the period on duty was at least 17 hours and 15 minutes.

The jury saw and heard the witnesses and had before it the circumstances as to the time the train, with the new crew aboard, passed plaintiff's train as it stood on the siding at Warwick; the distance it had to run to the station; the distance the new crew

had to walk back; and the fact that a delay was necessarily incident to ascertaining the place where the train was which they had to take over. Under these circumstances the issue of fact was submitted to the jury by and under an instruction framed by defendant. Hence there cannot be any complaint that the law was not correctly laid down, and the only thing left is the pure question of fact which is not open here.

In this connection (Brief 29) counsel make an argument to the effect that plaintiff was guilty of contributory negligence, because he went to work in his sleepy condition, which, it is said, he knew and failed to report.

Contributory negligence is not in the case, as a defense, but merely as a thing to be considered in assessing damages. No question as to the amount of the verdict is open here.

Assuming that when speaking of contributory negligence counsel really have in mind, assumption of the risk, the cases they cite may be considered.

Smith v. *A. T. & S. F. Ry. Co.*, 39 Tex. Civ. App. 468; 87 S. W. 1052, arose under a statute of Arizona which prohibited a railroad company from requiring any conductor, etc., who had worked for 16 hours from going on duty or performing any work until he had had 9 hours of rest. The statute did not prohibit the railroad from "permitting" the employe to go to work, as does the "Hours of Service Act." The pith of the decision lies in these words (39 Tex. Civ. App. 471):

> "It may have been a violation of a statute upon the part of appellee, to require appellant

> to work over sixteen hours, unless there was actual necessity for it, and in case others had been injured through the violation of law, appellee would doubtless be held liable, but appellant voluntarily acted with appellee in the violation of the statute, and will be held to have assumed all risks arising from such act."

This seems like an application of the *in pari delicto* rule to the doctrine of assumed risk, and it is clearly against the weight of authority. Besides it is to be observed there was not any statute in Arizona containing any provision similar to section 4 of the Employers' Liability Act of 1908.

Still, apart from statutory declaration that the servant does not assume any risk arising from the master's violation of a statute, the same rule obtains in most of the states, as the necessary corollary of the statute prohibiting the doing of, or commanding refraining from doing a thing by the master. The subject is very exhaustively discussed in *Streeter* v. *Western Wheeled Scraper Co.*, 254 Ill. 244, 248-60. The court there (p. 249) points out that in 14 named states the risk arising from the master's violation of a statute is not assumed, even though there be no statutory declaration to that effect, while in 10 states it is assumed unless there be a statutory provision, and adds:

> "The same contradictory decisions are found in the federal courts in different circuits as in the state courts."

Basing itself (p. 251) upon the decision of TAFT, LURTON AND THOMPSON, J. J., in *Narramore* v. *Cleveland, C. C. & St. L. Ry. Co.*, 37 C. C. A. 499; 96 Fed.

298, the Illinois court fell in line with the majority of the state courts, and pointed out (p. 257):

> "If the employe must assume the risk of the employer's violation of the statute the act is a delusion so far as the protection of the former is concerned. He is in the same condition as before it was passed. He is compelled to accept the employment; he must assume the risk; when he is killed or crippled, he and those dependent on him have no remedy and the law is satisfied by the payment of a fine."

This reasoning disposes of *Schweig* v. *C. M. & St. P. Ry. Co.*, 216 Fed. 750.

Let it be assumed, for the moment, that plaintiff was "off duty" within the meaning of the law during the journey from Warwick to Cleveland, what of it? The law had been constantly violated from the time he was called (or at all events reported) on August 19th until he turned over the train at Warwick on the morning of the 22nd. Now if plaintiff's condition when he went to work at Cleveland, was contributed to by this violation, then he did not assume the risk of that condition.

The only risk he could possibly be said to have assumed was the risk of the more than unusual closeness of the siding to the main track, but it is not suggested in the argument that plaintiff did assume that risk, nor, indeed, would such a suggestion be for a moment tenable in view of the undisputed evidence that plaintiff knew nothing of the unusual conditions at Peninsula.

It may be well to note here that instruction number 16, given at defendant's request (Trans. 157;

Rec. 322), deals with the subject of contributory negligence and concludes as follows:

> "Provided, however, that in case you find, from the evidence, that a violation of the Hours of Service Act contributed to the injury in question, then it is your duty to hold that the plaintiff was not guilty of contributory negligence."

It will be observed the defendant did not say by this instruction that it was necessary the injury should have been "caused" by a violation of the act, but merely that such violation "contributed to" the injury. Nor were the jury told that it was necessary the plaintiff should have been injured while the act was being violated. It was left to the jury as a matter of fact whether the injury was "contributed to" by the violation of the act. They have found it was, and there is ample evidence to sustain the verdict. Knowing the long hours plaintiff had been on duty, the defendant kept him on duty overtime at Warwick, compelled him to ride to Cleveland on a freight train where, as it knew, he had no chance to rest, and then "called" him for duty practically as soon as he arrived.

Above all, defendant's instruction numbered 20 left it to the jury to find whether, when plaintiff left Cleveland, he knew he was not in a fit condition to exercise reasonable care for his own safety, and advised them that if he did know, and because of his condition did not exercise reasonable care for his own safety, the verdict should be not guilty. The verdict was guilty, so it must be assumed the jury found either that when plaintiff left Cleveland

he did not know he was incapable of exercising due care for his own safety, or else that he did exercise it. In either event the fact was found under law of defendant's own making.

This leads to proximate cause.

III.

THERE WAS A PROXIMATE RELATIONSHIP BETWEEN PLAINTIFF'S INJURY AND THE VIOLATION OF THE LAW.

The argument made under POINT II of defendant's brief ignores the principle of the last straw; it ignores the evidence, and it does not fairly represent the record.

From early in the afternoon of August 19th, until the mid-forenoon of the 22nd, plaintiff had been engaged in defendant's business, with practically no rest, with but little more time to himself than enough to go home and get dinner on two occasions. If never before, the "Hours of Service Act" was violated on the trip from Newcastle Junction to Warwick; his train turned over to another crew, plaintiff, under pay, was directed to go to Cleveland, and to do it under circumstances which, as defendant knew, precluded rest; within 5 hours of his arrival in Cleveland he was called again and injured. But, say counsel, we "may not go into the realm of speculation and conjecture and blindly conclude" that had defendant turned over his train 30 minutes earlier he would not have been injured (Brief, p. 32). It may be asked by what right can we go into the same realm and blindly conclude he would have been injured had the law been complied with. Con-

gress set the limit of human endurance at 16 hours —and it stretched the limit—how can it be said what fraction of an hour or a day over that time causes the breakdown? That plaintiff was tired and sleepy is not denied; that his condition was due to defendant's demands cannot be denied; that defendant violated the law at least on the trip from Newcastle to Warwick is established; can defendant be heard to say "show me" that plaintiff would not have been just as sleepy if I had not been a law-breaker?

If counsel's proposition be correct then it must follow that a railroad company might keep a man on duty and at work for 3 days continuously, "call" him again after 10 hours "rest" standing on the rear platform of a caboose, and then, if he is injured immediately after, say "show me" that the 72 hours' labor made him tired!

Section 4 of the Employers' Liability Act of 1908 provides that the doctrine of assumed risk shall not apply if the carrier's violation of a statute enacted for the safety of employes "contributed to the injury" of the employe, and section 3, as to contributory negligence is in like words. How much of a contribution the law-breaking must make is not indicated, whether it forms the whole load, or is only the last straw is immaterial—the question is: Did it contribute?

The question of contribution must, of course, be determined by the jury, under the instructions of the court, and if, in this case, the instructions were not sufficiently definite, defendant cannot complain.

By its instruction numbered 16 (Trans. 156-7; Rec. 322) the court was invited to, and did, submit to the jury the question whether a violation of the statute "contributed to the injury in question," but nothing is said as to whether the extent of the contribution should be great, small, or average. The instruction was in the words of the statute, and that is sufficient.

If, as counsel urge, there is no evidence of any character whatever showing a connection between the violation and the injury, why did they ask the court to submit the matter to the jury as a question of fact? It is true defendant's instruction 27 sought to have the court hold, as a matter of law, that there was not any causal connection between the violation of the act and the injury, but since defendant offered instructions 16 and 27 together, it cannot complain that the court gave 16, and rejected 27, which was contradictory to it. The court's choice was invited by defendant (*Nilson Mach. Co.* v. *Kurtz Auction Co.*, 186 Ill. App. 424, 430; *Pianco* v. *Herbert L. Joseph & Co.*, 188 Ill. App. 555, 557; *Spencer* v. *Standard Roofing Co.*, 163 Ill. App. 301, 309). And having submitted the question whether a violation of the "Hours of Service Act" contributed to the injury as a question of fact, defendant cannot now urge it as a question of law (*Gascoigne* v. *Metropolitan El. Ry. Co.*, 239 Ill. 18, 22; *Chicago T. R. R. Co.* v. *Schmelling*, 197 Ill. 619, 625; *Spring Valley Coal Co.* v. *Robizas*, 207 Ill. 226, 230; *Domando* v. *Parker-Washington Co.*, 163 Ill. App. 158, 161; *Haynes* v. *Century Coal Co.*, 171 Ill. App. 83, 89-90).

As is said in defendant's suggestions in opposition to the motion to dismiss or affirm (p. 10), the proximate connection between plaintiff's injury and his unfitness for duty is clearly established. The question whether the violation of the act contributed to it was, at defendant's request, left to the jury as one of fact. How can it be heard in this court to complain?

IV.

THE EFFECT OF THE HOURS OF SERVICE ACT.

It is urged under Point III of defendant's brief (pp. 37-40) that the act is exclusive of remedies provided by the common law or state statutes, which is true, and from this it is argued the injury must occur while the defendant is in *flagrante delicto*, and that, by the jury being permitted to consider whether the violation on the trip to Warwick contributed to the injury, the doctrine of assumed risk and contributory negligence were eliminated.

As to the first point, it is sufficient to say the Employers' Liability Act contains no such condition, and to read it into the statute would destroy its beneficent purpose, which has been so often declared. The language of the law is plain—if the violation contributes to the injury that is sufficient. If the view suggested by counsel were to be adopted, there could be no recovery in a case where a man had been worked into such a condition of exhaustion that he required 48 hours of rest to restore him, provided he had been given 10 hours' time in which to learn the railroad's track from the rear platform of a caboose!

However the language of the "Hours of Service Act" is that if a man has been worked 16 consecutive hours he must have "at least" 10 consecutive hours off duty. Considering the care with which language is used in this statute, and the minute examination it was subjected to in congress, it is fair to assume the words "at least" are not used as interchangeable with "only."

As to the second point, it is answered by the fact that defendant's instruction 16 (Trans. 156-7; Rec. 322) submitted the question whether the violation of the act contributed to the injury. One cannot complain of his opponent's instructions when his own lay down the same rule of law. *Consolidated Coal Co.* v. *Haenni*, 146 Ill. 614, 621; *Chicago & A. R. R. Co.* v. *Harrington*, 192 Ill. 9, 25; *Flood* v. *Keeley Brew'g Co.*, 175 Ill. App. 441, 444.

V.

THE QUESTIONS ARGUED BY DEFENDANT ARE NOT OPEN.

The first four errors relied upon, and the eighth are not open, because they present no federal question (*Stickney* v. *Kelsey*, 209 U. S. 419, 420). As there said, "They simply allege in various forms" that the court erred. They do not point out a federal right denied.

The sixth error relied on (Brief, 18) is disposed of by the fact that, at the same time defendant submitted its instruction 16. The authorities cited in the suggestions heretofore filed by plaintiff (p. 11) and those cited under POINTS III and IV, *supra*, dispose of this.

Number 5 (Brief, 18) cannot possibly raise any question because there is evidence tending to support both the Hours of Service counts and also that one (the 2nd) based on the construction of the tracks at Peninsula; and assuming contributory negligence and assumption of risk to be in the case, they were questions for the jury. Besides, it was not claimed in the State Supreme Court and is now claimed here that a verdict should have been directed on the 2nd count, so, as pointed out in the original "Suggestions" (p. 10) the right to argue that, as a matter of law, there was no liability shown under that count, is waived.

As to the 7th error relied on (Brief, 19) that is plainly untenable because defendant, by its instruction 16, submitted to the jury the very question submitted by plaintiff's number 1, viz., Did the violation of the Hours of Service Act contribute to the injury?

The condition of the record is fully discussed in plaintiff's Suggestions in support of his motion to dismiss or affirm, and to them we refer the court.

There being not only no question open here, but no error in the record, it is submitted there should be an affirmance, if not a dismissal of the writ.

MORSE IVES,
Attorney for Plaintiff in Error.

APPENDIX.

Extract From Speech of Senator La Follette, January 9, 1907.

(Cong. Rec., Vol. 41, Pt. 1, pp. 812-3.)

"I shall not take the time of the Senate, sir, to go into this table very fully, but I will briefly run over the pages and call attention to a few of the cases reported in this table, because it seems to me they are pertinent to the consideration of the pending bill.

In one of the first or earlier cases reported in this table, I find this entry: 'Collision. Engineman asleep; hours on duty, 17; hours of rest preceding the service'—which was interrupted by this accident—'hours of rest, 2.' That is, this engineer who fell asleep upon his engine had been seventeen hours on duty, and had gone on duty—*had been called by the company to go upon his engine*—after having had only two hours to rest following the preceding service.

Another: 'Collision. Train not under control' is stated as the cause of this collision. 'The hours on duty, 42.' No statement accompanies this report by the company showing that there had been any rest accorded to those in charge of that train immediately *preceding their call* to go upon this duty.

Another: 'Collision. The engineman dozing; 17 hours on duty,' and with only six hours' rest immediately preceding his *call* to this service.

Another, resulting in the killing of one man, the cause being stated as follows: 'Signalman went back to flag; fell asleep; 20 hours on service.' No previous hours of rest reported.

Another, resulting in collision: 'Engineman asleep; twenty hours on service.' He had had twenty hours of rest immediately preceding his service; but it needs no statement of mine, sir, to remind anybody seriously considering this subject that no man is physically capable of rendering any service to which responsibility is attached when he has been twenty hours in continuous service, I care not how long a rest he had preceding that service.

Another case, resulting in collision; cause reported by the railway company: 'Flagman neglected to flag; hours on duty, nineteen.' It is not very strange, Mr. President, that he neglected to flag.

Another, resulting in collision: 'Engineman dozing; twenty hours on service.' Twenty hours on duty, following twenty-four hours of rest.

Another, resulting in collision: 'Engineman mistaking signals.' This poor fellow had twenty-seven hours on duty, after nineteen hours of rest. It would have been strange, Mr. President, if he had been capable of understanding signals with twenty-seven hours of continuous service.

Another, resulting in collision: 'Engineman going to sleep; fifteen hours on duty, with five hours of rest *immediately preceding the call for that service.*'

Mr. President, I pause for a moment to say that while this bill limits the service to sixteen consecutive hours I would be glad indeed, sir, to see adopted

a bill with a much shorter limitation. Whatever rest may be allotted to one preceding sixteen hours of continuous service it is hardly rational to expect from that man a full and complete command of all his powers; and, sir, if there be any service in which men engage where the concentration of all the faculties, where the greatest alertness of the mind, where the largest possible reserve of vitality are absolutely essential to the discharge of that service it is surely in this very important work of conducting the trains which carry the passengers of this country upon the railroads.

I cite another case from this record, following very closely upon the heels of the one last submitted, which resulted in collision in which there was loss of life and injury to persons: 'Train orders overlooked.' Twenty-two hours on service, *with three hours of rest immediately preceding the call to duty* on the part of the men engaged in running the train.

Another, where the cause is stated as follows: 'Engineman falling asleep.' Twenty hours on service, following twenty-one hours of rest.

Another, where the cause of the trouble is stated as follows: 'Train standing on siding; trainman, sleeping, fell from the engine.' Twenty-five hours on duty. Had twenty-four hours of rest *preceding that call to duty.*

Another, where the conductor went back upon the track to flag, sat down upon the end of a tie, went to sleep, and was struck; twenty hours on service, following nine hours of rest.

Another: 'Trainman sent out to flag; fell asleep on track; struck by a passing train.' Sixteen hours on duty; no hours of rest *preceding this call* to duty reported.

Another: 'Brakeman sent out to protect train; sat down on end of tie, and went to sleep; struck.' Seventeen hours on duty; no hours of rest reported.

Another: 'Brakeman out flagging; went to sleep sitting on end of tie; hand lamp hidden from view; struck by relief train.' Sixteen hours on duty; no hours of rest reported.

Another, resulting in collision, cause stated: 'Engineman using poor judgment by stopping on a curve.' Forty-three hours on duty; no rest reported *previous to this call* to service. It is not to be marveled at, Mr. President, that this man exercised what is termed by the company reporting this case as 'poor judgment.'

MR. BEVERIDGE. What road is that?

MR. LA FOLLETTE. Answering the question of the Senator from Indiana, I will say that this table, as prepared, does not, for manifest reasons, state the names of the companies. This information, under the law requiring the companies to report, is received by the Interstate Commerce Commission, and is in a measure in the nature of a confidential communication—that is, to this extent: That it is not to be used in such a way as to subject the company to litigation. If the table so prepared contained the statement of the names of the companies in this case, it might result in the violation of that statute. They are not here given. I will state, however, Mr. Presi-

dent, that I think I have a copy of the record here, which will verify each one of these statements, which I have in my possession temporarily and which I will show personally to any Senator who would care to see it.

MR. BEVERIDGE. Mr. President—

THE VICE-PRESIDENT. Does the Senator from Wisconsin yield to the Senator from Indiana?

MR. LA FOLLETTE. Certainly.

MR. BEVERIDGE. I want to assure the Senator from Wisconsin that my inquiry from my seat was not because I had any doubt of the accuracy of these reports. The reason I asked the question in the particular example given was that I was shocked, as I am sure every Senator here was who heard it, that any road would be capable of keeping any man on duty forty-three hours without rest. I should be very glad, if it were possible, to have a road that would subject men to such inhuman treatment known to the American people.

MR. LA FOLLETTE. It is but just, Mr. President, to say, in response to the statement of the Senator from Indiana, that some cases to which I will call attention, where I think the hours of service extended over as long a period of time as in this case which excites the indignation of the Senator from Indiana, are cases where the men are responsible, apparently, from the statement given here, so far as the initiative is concerned, for such extended hours of service. I say that, Mr. President, to emphasize the point to which I adverted briefly earlier in my remarks, that we cannot always trust this matter to

the pleasure of the railway employes themselves. Some of them are so anxious to extend their runs within the month and so desirous of adding to their earnings that they will take great risks themselves and inflict upon the public very great risks in so doing.

Following the case last reported is another, resulting in collision, where the cause stated by the company is as follows: 'Engineman asleep and running by board.' I take that to mean some signal that should have arrested him; but he had been twenty hours on duty, as shown by this statement.

Another, resulting in collision, stated as follows: 'Engineman failing to have engine under control approaching protected water station.' But he had been nineteen hours on duty.

Another, resulting in collision: 'Engineman of one train asleep;' eighteen hours on duty; three hours of rest immediately preceding that *call* to duty. 'Conductor and flagman of approaching train also asleep;' thirteen hours of duty, preceded by only seven hours of rest.

Another, resulting in collision, where the cause is stated by the railway company as follows: 'Responsibility rests with engineman and conductor for running train at high speed in block entered under caution signal.' Thirty-four hours on duty; fourteen hours of rest *preceding this call* to service.

Another, resulting in collision: 'Failure of engineman to obey order' is stated by the railway company as the cause; but this man had been

twenty-four hours on duty with no rest reported *preceding this call* to service.

Another, resulting in collision: cause, as stated by company, 'Train not under control; engineman and brakeman responsible.' Nineteen hours on duty, with only eight hours of rest preceding.

Another, collision, the cause stated by the company as follows: 'Failure of engineman to comply with rules requiring all extra trains to approach side tracks under control.' Nineteen hours on duty; only ten hours of rest immediately preceding.

Another: 'Brakeman struck by bridge and knocked off tender of engine; instantly killed.' Twenty-one hours on duty.

Another: 'Brakeman sent out to flag train sat down on end of tie and fell asleep.' Twenty-three hours on duty; no rest reported.

Another: 'Failure of engineman to stop train in time to avoid rear collision.' Twenty-three hours on duty.

Another: 'Failure to protect rear end of train by flag; conductor and engineman responsible.' Thirty hours on duty; only eight hours of rest *preceding this call* to service.

Another, resulting in collision; cause stated by the company: 'Engineman running train through yard not under control.' But he had been twenty hours on duty.

Another: 'Failure of conductor to properly protect his train.' Twelve hours on duty. The con-

ductor of the other train, as stated by the company, 'failed to have engineman reduce speed.' Twenty-two hours on duty.

Another: 'Engineman going to sleep on duty and allowing train to approach a wreck at high speed.' He had been fifteen hours on duty without any previous rest since his *last preceding call*, so far as reported by the company.

Another: 'Engineman asleep; did not stop train in time.' Twenty-two hours on duty.

Another, collision: 'Both engineman and head brakeman asleep when passing switch.' Nineteen hours on duty.

Another, resulting in collision: 'Engineman on rear extra did not have train under control approaching end of double track.' Twenty-four hours on duty.

Another, resulting in collision: 'Engineman did not have his train under control approaching derail.' Twenty hours on duty.

Another, resulting in collision: 'Engineman fell asleep approaching tunnel.' Twenty hours on duty. No rest immediately *preceding his call* to duty is reported by the company.

Another, resulting in collision: 'Train not properly protected; conductor, brakeman and engineman at fault.' Twenty-two hours on duty. Seventeen hours of rest preceding.

Another, resulting in collision; cause stated by the railroad company: 'Engineman asleep; had made two straight double runs previous to this on

account of shortage of men; record good.' Forty-eight hours on duty. Only six hours of rest.

Another, collision: cause stated by the company: 'Engineman dropping to asleep after he had been flagged; was on his fourth trip and had had but two hours' rest at end of each; was not required to make so many continuous trips, but desired to earn the additional wages.' Forty-five hours of service.

It seems to me, Mr. President, that cases like that to which I have just called attention are a sufficient answer to the claim made by nearly every Senator who opposed this legislation at the last session, that this matter of the regulation of the hours of service was something that ought to be left to the parties directly interested, to wit, the railroad companies and the men; that they could settle and determine it best by contract, and that almost all the roads of the country had entered into contract which provided ample protection to the public in this respect. Even where such contracts exist they are constantly violated, not only by the companies, but also by the men. In many instances the contracts provide that the men may overrun the limit fixed in the contract when they desire to do so, or, to state it differently, the limitation is not enforced excepting as the men invoke its protection.

It is hardly necessary to add, Mr. President, that the desire on the part of the railway employe to have a good standing with those who are immediately in authority over him, *those who issue the calls for him to go on service* and who have to do

directly with his promotion, if he succeeds in securing promotion—it is hardly necessary for me to say that the desire on the part of these men to have good standing with and to secure a favorable report from those in authority who call them into service will inevitably force men, even against their will, against their better judgment, to comply with every call that is made. It would be rare, indeed, I believe, to find cases where men have refused, whatever may be the contract with the company, to go into service no matter how exhausted and wearied they may have been by previous service.

I call the attention of the Senate to another case resulting in collision. The cause as stated by the company is as follows: 'Freight train standing on track without protection; flagman in caboose asleep; conductor and flagman responsible.' Twenty-two hours on duty, with twelve hours of rest preceding.

Another, collision: the course assigned by the company: 'Conductor and engineman of extra freight train disregarded orders.' They had, however, been on duty for twenty-one hours. *Preceding this call* to duty they had a full period of rest. This only emphasizes the fact that whatever rest may be given these men prior to their call to duty the term of the hours of continuous service should be limited if they are to be protected or if the public is to be accorded any protection.

Another case reported is as follows: The cause of this injury was 'watchman sitting on ends of ties asleep; struck by train.' Twenty-one hours on duty without any previous report of hours of rest.

Another case, where the cause stated by the company is this: 'Freight brakeman sent back to flag, sat down on rail and is supposed to have gone to sleep; struck and killed.' Nineteen hours on duty.

Another, collision: 'Failure of brakeman to have his train move into track carefully, so as to be prepared to stop promptly.' Twenty hours of service; twenty hours on duty, with only three hours of rest immediately preceding this *call* to service.

Another case: 'Failure of crew to flag and of engineman to keep lookout.' Twenty-one hours of service.

Another, collision: 'Extra train passed red Hall signal; flagman asleep in caboose.' Twenty-one hours on duty.

Another case reported: 'Yard trainman lying on main track asleep; struck and run over by passenger train.' Twenty-two hours of duty; only five hours of rest immediately preceding this *call* to duty.

Another collision: 'Rear-end collision on account of engineman not keeping his train under proper control; did not handle air brake properly.' But he had been nineteen hours on service without any rest preceding this call to service.

Another, where the switch tender is reported as 'failing to close the switch.' He had been eighteen hours on duty without any rest reported *prior to this call to duty.*

Another, where the cause of the collision is stated as follows: 'Work extra on the time of extra train, which was running on schedule; conductor and

engineman responsible.' Twenty hours on duty; only six hours of rest *preceding that call to duty.*

Another resulting in injury: 'Fireman on freight train dropped off to sleep and fell, striking his head on deck of engine cab.' Twenty-two hours on duty; no rest reported.

Another: 'Brakeman sent out to flag discovered sitting on end of tie; struck and knocked off before train could be stopped.' Nineteen hours on duty; no rest reported.

Another, where the case is stated as follows: 'Freight brakeman sent back to flag fell asleep while sitting on rail; struck and killed by engine; fog prevailing.' Twenty hours of service, with only seven hours of rest preceding. Possibly if the fog had not been prevailing the engineer who struck him might have seen him and stopped his engine, unless he, too, had been on service for the same length of time or longer."

Colloquy between Senators Patterson and Spooner. (Cong. Rec. Vol. 41, pt. 1, p. 826.)

"MR. SPOONER. May I ask the Senator from Colorado a question before he takes his seat?

MR. PATTERSON. Certainly.

MR. SPOONER. Would it not improve the language of the section to say 'to remain on duty' more than sixteen hours instead of 'to remain at work'?

MR. PATTERSON. Yes.

MR. SPOONER. The Senator made a suggestion that I think has great weight, but can he find some language to overcome the difficulty he suggested?

MR. BEVERIDGE (to Mr. Patterson). Have you thought of any language?

MR. PATTERSON. I have thought of some such suggestion as the following: Instead of saying 'who have been at work for sixteen consecutive hours,' use the language 'who have been at work sixteen hours during a twenty-four-hour period.'

MR. BEVERIDGE. It is not 'at work.' It is 'remain on duty' in the bill.

MR. PATTERSON. Yes; 'remain on duty' for a certain number of hours during a fixed period.

MR. SPOONER. I had in my hand a copy of the substitute."

BALTIMORE & OHIO RAILROAD COMPANY v. WILSON.

ERROR TO THE APPELLATE COURT, FIRST DISTRICT, STATE OF ILLINOIS.

No. 375. Argued December 5, 1916.—Decided December 18, 1916.

Under the Employers' Liability Act, c. 149, §§ 3, 4, 35 Stat. 65, the defenses of contributory negligence and assumption of risk are eliminated when the proximate cause of the injury is physical exhaustion attributable to a violation of the Hours of Service Act, c. 2939, § 2, 34 Stat. 1416.

So *held*, where a rest of more than the minimum period required by the latter act had intervened between the violation and the injury.

THE case is stated in the opinion.

Mr. James B. Sheean, with whom *Mr. William J. Calhoun*, *Mr. Will H. Lyford* and *Mr. George E. Hamilton* were on the briefs, for plaintiff in error:

Under the Hours of Service Act, there can be no recovery in this case unless at the time of the injury the fact of plaintiff's then being on duty was a violation of the act. The carrier is not an insurer of the safety of the employee after the expiration of 16 hours, nor is it responsible for any and all injuries which he may sustain while employed after 16 hours of continuous service. Even where the employee is injured while on duty in violation of the act, it is necessary to establish a proximate relationship between the injury and the violation of the law—it must be shown that the violation brought about or proximately contributed to the injury. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *McWhirter*, 229 U. S. 265. See also *Atchison, Topeka & Santa Fé Ry. Co.* v. *Swearingen*, 239 U. S. 339. Plaintiff did not resume duty until 14 hours

after the violation of the act. He had 4 hours' rest in excess of the minimum fixed by the statute, and the injury did not occur until 16 hours after the violation of the law. He therefore was not on duty in violation of the Hours of Service Act at the time of the injury; the violation was not the proximate cause of the injury; and the defenses of assumption of risk and contributory negligence were available to the carrier.

The Hours of Service Act is a legislative finding of the boundaries of the employer's liability for injuries caused by permitting employees to remain on duty an excessive number of hours. The rights and duties of carriers subject to the act must be found in the language of the act itself. *Erie R. R. Co.* v. *New York*, 233 U. S. 671. If the construction given to the act by the court below be permitted to stand and juries, in the exercise of their discretion, may extend the minimum off time designated by the statute to suit different situations so as to eliminate the defenses of assumed risk and contributory negligence, the manifest purpose of Congress as set forth in the statute is destroyed and a uniform application of the statute is rendered impossible.

Mr. Morse Ives for defendant in error.

Mr. Justice Holmes delivered the opinion of the court.

This is an action for personal injuries, brought under the Hours of Service Act, March 4, 1907, c. 2939, § 2, 34 Stat. 1415, 1416, and the Employers' Liability Act, April 22, 1908, c. 149, 35 Stat. 65. There is a count alleging an improper construction of tracks, and there are others, which alone are of importance here, alleging that the plaintiff was kept on duty for more than sixteen hours and subsequently, (we may take it in fact to have been fourteen hours later,) put on duty again and injured be-

cause he was so exhausted as to be unable to protect himself in the work that he was attempting to perform. At the trial the judge instructed the jury that if they found that the defendant had been guilty of the breach of duty alleged and that the breach proximately contributed to the plaintiff's injury then they should not consider negligence, if any, on the part of the plaintiff, in determining the amount of the plaintiff's damages, if any. In other words, under § 3 of the Employers' Liability Act he allowed a violation of a statute enacted for the safety of employees to be found to exclude contributory negligence, although at the time of the accident the violation was fourteen hours old.

It is not important to give the particulars of the accident. The plaintiff was a freight conductor, and was intending to cut a car with a hot box out of a train. He stood on the running board at the rear of an engine on a side track until it drifted abreast of the car standing on the main track, when he stepped off and was very badly hurt.

The first step in the Railroad's real defence was that the plaintiff was not kept on duty more than sixteen hours, a proposition that there was substantial evidence to maintain. But that having been overthrown by the verdict, it contends that the injury must happen during the violation of law or at least that the Hours of Service Law fixes the limit of possible connection between the overwork and the injury at ten hours by the provision that an employee after being continuously on duty for sixteen hours shall have at least ten consecutive hours off. It also objects that the plaintiff if feeling incompetent to work should have notified the defendant. But no reason can be given for limiting liability to injuries happening while the violation of law is going on, and as to the ten hours the statute fixes only a minimum and a minimum for rest after work no longer than allowed. It has nothing to do with the

question of the varying rest needed after work extended beyond the lawful time. In this case there was evidence that whether technically on duty or not the plaintiff had been greatly overtaxed before the final strain of more than sixteen hours and that as a physical fact it was far from impossible that the fatigue should have been a cause proximately contributing to all that happened. If so, then by the Employers' Liability Act, §§ 3 and 4, questions of negligence and assumption of risk disappear.

Judgment affirmed.